INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

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

VOLUME VII

1966

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

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

VOLUME VII

The present volume contains the Oral Arguments relating to the Preliminary Objections in the *South West Africa* cases. The proceedings in these cases, which were entered on the Court's General List on 4 November 1960 under numbers 46 and 47, were joined by an Order of the Court of 20 May 1961 (*South West Africa, Order of 20 May 1961, I.C.J. Reports 1961*, p. 13). Two Judgments have been rendered, the first on 21 December 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319), and the second on 18 July 1966 (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6).

The page references originally appearing in the pleadings have been altered to correspond with the pagination of the present edition. Where the reference is to another volume of the present edition, the volume is indicated by a roman figure in bold type.

The Hague, 1966.

Le présent volume reproduit les plaidoiries relatives aux exceptions préliminaires dans les affaires du *Sud-Ouest africain*. Ces affaires ont été inscrites au rôle général de la Cour sous les n°s 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

Les renvois d'un mémoire à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition. Lorsqu'il s'agit d'un renvoi à un autre volume de la présente édition, un chiffre romain gras indique le numéro de ce volume.

La Haye, 1966.

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PART II

ORAL ARGUMENTS

PUBLIC HEARINGS

*held at the Peace Palace, The Hague,
from 2 to 22 October and on 21 December 1962,
(Preliminary Objections), the President, Mr. Winiarski, presiding,
and from 15 March to 14 July, 20 September to 15 November
and 29 November 1965, 21 March and on 18 July 1966 (Merits),
the President, Sir Percy Spender, presiding*

DEUXIÈME PARTIE

PLAIDOIRIES

AUDIENCES PUBLIQUES

*tenues au Palais de la Paix, La Haye, du 2 au
22 octobre et le 21 décembre 1962 (exceptions préliminaires),
sous la présidence de M. Winiarski, Président,
et du 15 mars au 14 juillet 1965, du 20 septembre au 15 novembre 1965,
le 29 novembre 1965, le 21 mars 1966 et le 18 juillet 1966 (fond),
sous la présidence de sir Percy Spender, Président*

SECTION A

ORAL ARGUMENTS CONCERNING THE PRELIMINARY OBJECTIONS

PUBLIC HEARINGS

held from 2 to 22 October and on 21 December 1962, the President, Mr. Winiarski, presiding

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SECTION A

PLAIDOIRIES CONCERNANT LES EXCEPTIONS PRÉLIMINAIRES

AUDIENCES PUBLIQUES

tenues du 2 au 22 octobre et le 21 décembre 1962, sous la présidence de M. Winiarski, Président

MINUTES OF THE HEARINGS HELD FROM 2 TO 22 OCTOBER AND 21 DECEMBER 1962

YEAR 1962

THIRTY-FIFTH PUBLIC HEARING (2 X 62, 4 p.m.)

Present: *President* WINIARSKI; *Vice-President* ALFARO; *Judges* BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI; Sir Louis MBANEFO, The Honourable J. T. VAN WYK, *Judges* ad hoc; M. GARNIER-COIGNET, *Registrar.*

Also present:

For the Governments of Ethiopia and Liberia:

The Honourable Ernest A. GROSS, Member of the New York Bar, *as Agent and Counsel:*

assisted by:

The Honourable Edward R. MOORE, Assistant Attorney General of Liberia,

Mr. Leonard S. SANDWEISS, Member of the New York Bar,

as Counsel.

For the Government of the Republic of South Africa:

Dr. J. P. VERLOREN VAN THEMAAT, S.C., Law Adviser to the Department of Foreign Affairs, *as Agent;*

Mr. Ross MCGREGOR, Deputy State Attorney, *as Additional Agent;*

Mr. D. P. DE VILLIERS, S.C., Member of the South African Bar,

Mr. G. VAN R. MULLER, S.C., Member of the South African Bar,

as Counsel;

Mr. J. S. F. BOTHA, Department of Foreign Affairs, *as Adviser;*

Mr. F. D. TOTHILL, Department of Foreign Affairs, *as Secretary.*

The PRESIDENT opened the hearing and announced that the Court was assembled to deal with the dispute between Ethiopia and Liberia on the one hand and the Republic of South Africa on the other concerning South West Africa. Proceedings in these cases were instituted by two Applications filed in the Registry on 4 November 1960, one by the Government of Ethiopia and one by the Government of Liberia. Time-limits for the filing of the first pleadings were fixed by an Order of 13 January 1961. Within the time-limit fixed by the Court for the filing of the Counter-Memorial of the Government of the Republic of South Africa, that Government filed certain Objections to the jurisdiction of the Court. The proceedings on the merits were accordingly suspended and a time-limit was fixed within which the Governments of Ethiopia and Liberia might present written statements of their Observations and Submissions on the Objections. These Observations were filed within the time-limit prescribed and the case was then ready for hearing.

Since the Court does not include upon the Bench any judge of the nationality of the Applicants or of the Respondent, the former and the latter indicated their intention to avail themselves of the right conferred

PROCÈS-VERBAUX DES AUDIENCES TENUES DU 2 AU 22 OCTOBRE ET LE 21 DÉCEMBRE 1962

ANNÉE 1962

TRENTE-CINQUIÈME SÉANCE PUBLIQUE (2 X 62, 16 h)

Présents: M. WINIARSKI, *Président;* M. ALFARO, *Vice-Président;* MM. BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, sir Percy SPENDER, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI, *Juges;* sir Louis MBANEFO, M. J. T. VAN WYK, *Juges* ad hoc; M. GARNIER-COIGNET, *Greffier.*

Présents également:

Pour les Gouvernements éthiopien et libérien:

M. Ernest A. GROSS, Membre du barreau de New York, *comme agent et conseil;*

Assisté par:

M. Edward R. MOORE, *Attorney General* adjoint du Libéria,

M. Leonard S. SANDWEISS, Membre du barreau de New York, *comme conseils.*

Pour le Gouvernement sud-africain:

Dr. J. P. VERLOREN VAN THEMAAT, S.C., conseiller juridique du département des Affaires étrangères, *comme agent;*

M. Ross MCGREGOR, *State Attorney* adjoint, *comme agent supplémentaire;*

M. D. P. DE VILLIERS, S.C., membre du barreau d'Afrique du Sud,
M. G. VAN R. MULLER, S.C., membre du barreau d'Afrique du Sud, *comme conseils;*

M. J. S. F. BOTHA, du département des Affaires étrangères, *comme conseiller;*

M. F. D. TOTHILL, du département des Affaires étrangères, *comme secrétaire.*

Le PRÉSIDENT ouvre l'audience et annonce que la Cour se réunit pour examiner le différend entre l'Ethiopie et le Libéria d'une part et la République sud-africaine de l'autre au sujet du Sud-Ouest africain. Ces instances ont été introduites par deux requêtes déposées au Greffe le 4 novembre 1960, l'une du Gouvernement de l'Ethiopie et l'autre du Gouvernement du Libéria. Les délais pour le dépôt des premières pièces de la procédure écrite ont été fixés par ordonnance du 13 janvier 1961. Dans le délai fixé par la Cour pour le dépôt du contre-mémoire du Gouvernement de la République d'Afrique du Sud, ce gouvernement a présenté certaines exceptions à la compétence de la Cour. En conséquence, la procédure sur le fond a été suspendue et un délai imparti aux Gouvernements de l'Ethiopie et du Libéria, pour présenter leurs observations et conclusions sur les exceptions. Ces observations ont été déposées dans le délai prescrit et l'affaire s'est trouvée en état d'être plaidée.

La Cour ne comptant pas sur le siège de juges de la nationalité des Parties demanderesses et de la Partie défenderesse, les unes et l'autre ont notifié leur intention de faire usage du droit prévu à l'article 31,

by Article 31, paragraph 3, of the Statute. By an Order of 20 May 1961 the Court, considering that the submissions of the Applicants were, except in a few minor respects, identical and that accordingly they were in the same interest, joined the proceedings instituted by the two Applications and fixed a time-limit within which the Government of Ethiopia and the Government of Liberia, acting in concert, might choose a single judge *ad hoc*.

The Governments of Ethiopia and Liberia have designated Sir Louis Mbanefo, Chief Justice of the High Court, Eastern region of Nigeria, and the Government of the Republic of South Africa has designated the Honourable Jacques Theodore van Wyk, Judge of the Appellate Division of the Supreme Court of South Africa.

Article 20 of the Statute of the Court prescribes that every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously. The President called upon Sir Louis Mbanefo and Mr. Justice van Wyk to make this solemn declaration.

Sir Louis MBANEFO and Mr. Justice VAN WYK made their declarations.

The PRESIDENT placed on record the solemn declarations just made by Judge Sir Louis Mbanefo and Judge van Wyk and declared them duly installed as judges *ad hoc* for the purposes of the present case.

The President regretted to say that Judge Córdova, who is prevented by the state of his health from being present at The Hague, would be unable to sit in the present proceedings.

He noted the presence in Court of the Agents of the Parties and their Counsel and declared the oral proceedings open.

He called upon the Agent for the Government of the Republic of South Africa.

Dr. VERLOREN VAN THEMAAT made the speech reproduced in annex[1] and asked the President to call upon Mr. de Villiers.

The PRESIDENT called upon Mr. de Villiers.

Mr. DE VILLIERS began the speech reproduced in annex[2].

The Court rose at 6.30 p.m.

(Signed) B. WINIARSKI,
President.

(Signed) GARNIER-COIGNET,
Registrar.

THIRTY-SIXTH PUBLIC HEARING (3 X 62, 10.30 a.m.)

Present: [See hearing of 2 X 62; Vice-President Alfaro was absent.]

The PRESIDENT opened the hearing and stated that Vice-President Alfaro would be unable to be present, for reasons of health. He called upon Mr. de Villiers.

Mr. DE VILLIERS began the speech reproduced in annex[3].

(The hearing was adjourned from 12.50 p.m. to 4 p.m.)

Mr. DE VILLIERS continued the speech reproduced in annex[4].

The Court rose at 6 p.m.

[Signatures.]

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[1] See pp. 20-28.
[2] See pp. 29-36.
[3] See pp. 36-64.
[4] See pp. 64-76.

paragraphe 3, du Statut. Par ordonnance du 20 mai 1961, la Cour, considérant que les conclusions des Parties demanderesses étaient, sauf sur quelques points mineurs, identiques et que dès lors elles faisaient cause commune, a joint les instances introduites par les deux requêtes et a fixé le délai dans lequel le Gouvernement de l'Ethiopie et le Gouvernement du Libéria pourraient désigner d'un commun accord un seul juge *ad hoc*.

Les Gouvernements de l'Ethiopie et du Libéria ont désigné sir Louis Mbanefo, *Chief Justice* de la *High Court* de la région est de la Nigéria, et le Gouvernement sud-africain a désigné l'Honorable Jacques Théodore van Wyk, juge à l'*Appellate Division* de la Cour suprême d'Afrique du Sud.

L'article 20 du Statut prescrivant que tout membre de la Cour doit, avant d'entrer en fonctions, prendre en séance publique l'engagement solennel d'exercer ses fonctions en pleine impartialité et en toute conscience, le Président invite sir Louis Mbanefo et M. van Wyk à prononcer cette déclaration.

Sir Louis MBANEFO et M. VAN WYK prononcent leurs déclarations.

Le PRÉSIDENT prend acte des déclarations qui viennent d'être prononcées par sir Louis Mbanefo et par M. van Wyk et les déclare installés en leurs fonctions de juges *ad hoc* en la présente affaire.

Le Président a le regret d'annoncer que M. Córdova, juge, empêché par son état de santé de venir à La Haye, ne siégera pas en cette affaire.

Il constate la présence à l'audience des agents des Parties et de leurs conseils et déclare la procédure orale ouverte.

Il donne la parole à l'agent du Gouvernement de la République sud-africaine.

M. VERLOREN VAN THEMAAT présente l'exposé reproduit en annexe[1] et demande au Président de donner la parole à M. de Villiers.

Le PRÉSIDENT donne la parole à M. de Villiers.

M. DE VILLIERS commence l'exposé reproduit en annexe[2].

L'audience est levée a 18 h 30.

Le Président,
(Signé) B. WINIARSKI.
Le Greffier,
(Signé) GARNIER-COIGNET.

TRENTE-SIXIÈME SÉANCE PUBLIQUE (3 X 62, 10 h 30)

Présents : [Voir audience du 2 X 62; M. Alfaro, Vice-Président, absent.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Alfaro, Vice-Président, ne pourra pas assister à l'audience pour des raisons de santé. Il donne la parole à M. de Villiers.

M. DE VILLIERS commence l'exposé reproduit en annexe [3].

(L'audience, suspendue à 12 h 50, est reprise à 16 heures.)

M. DE VILLIERS continue l'exposé reproduit en annexe [4].

L'audience est levée à 18 heures.

[Signatures.]

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[1] Voir pp. 20-28.
[2] Voir pp. 19-36.
[3] Voir pp. 36-64.
[4] Voir pp. 64-76.

THIRTY-SEVENTH PUBLIC HEARING (4 X 62, 10.30 a.m.)

Present: [See hearing of 3 x 62.]

The PRESIDENT opened the hearing and stated that Vice-President Alfaro's state of health still prevented him from taking part in the hearing. He called upon Mr. de Villiers.

Mr. DE VILLIERS continued the speech reproduced in annex [1].

(The hearing was adjourned from 12.55 p.m. to 4 p.m.)

Mr. DE VILLIERS continued the speech reproduced in annex [2].

The Court rose at 6.25 p.m.

[Signatures.]

THIRTY-EIGHTH PUBLIC HEARING (5 X 62, 10.30 a.m.)

Present: [See hearing of 3 x 62.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. DE VILLIERS continued the speech reproduced in annex [3].

(The hearing was adjourned from 1 p.m. to 4 p.m.)

Mr. DE VILLIERS continued the speech reproduced in annex [4].

The Court rose at 6.20 p.m.

[Signatures.]

THIRTY-NINTH PUBLIC HEARING (8 X 62, 10.30 a.m.)

Present: [See hearing of 3 x 62; Judge Koretsky was absent.]

The PRESIDENT opened the hearing and announced that Judge Koretsky also would be unable to be present at this hearing for reasons of health. He called upon Mr. de Villiers to continue his speech.

Mr. DE VILLIERS continued the speech reproduced in annex [5].

(The hearing was adjourned from 12.55 p.m. to 4 p.m.)

Mr. DE VILLIERS continued the speech reproduced in annex [6].

The Court rose at 6.20 p.m.

[Signatures.]

FORTIETH PUBLIC HEARING (9 X 62, 10.30 a.m.)

Present: [See hearing of 8 x 62.]

The PRESIDENT opened the hearing and called upon Mr. de Villiers.

Mr. DE VILLIERS continued the speech reproduced in annex [7].

(The hearing was adjourned from 12.45 p.m. to 4 p.m.)

Mr. DE VILLIERS concluded the speech reproduced in annex [8].

The Court rose at 6.35 p.m.

[Signatures.]

FORTY-FIRST PUBLIC HEARING (10 X 62, 10.30 a.m.)

Present: [See hearing of 8 x 62.]

The PRESIDENT opened the hearing.

Dr. VERLOREN VAN THEMAAT asked the President to be good enough to call upon Mr. Muller, who would deal with the Third and Fourth Preliminary Objections.

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[1] See pp. 76-93.
[2] See pp. 93-109.
[3] See pp. 109-125.
[4] See pp. 125-138.
[5] See pp. 138-154.
[6] See pp. 154-169.
[7] See pp. 169-184.
[8] See pp. 184-199.

TRENTE-SEPTIÈME SÉANCE PUBLIQUE (4 X 62, 10 h 30)

Présents : [Voir audience du 3 x 62.]

Le PRÉSIDENT ouvre l'audience et annonce que l'état de santé de M. Alfaro, Vice-Président, ne lui permet toujours pas de prendre part à l'audience. Il donne la parole à M. de Villiers.

M. DE VILLIERS continue l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h 55, est reprise à 16 heures.)

M. DE VILLIERS continue l'exposé reproduit en annexe [2].

L'audience est levée à 18 h 25.

[Signatures.]

TRENTE-HUITIÈME SÉANCE PUBLIQUE (5 X 62, 10 h 30)

Présents : [Voir audience du 3 x 62.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.

M. DE VILLIERS continue l'exposé reproduit en annexe [3].

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

M. DE VILLIERS continue l'exposé reproduit en annexe [4].

L'audience est levée à 18 h 20.

[Signatures.]

TRENTE-NEUVIÈME SÉANCE PUBLIQUE (8 X 62, 10 h 30)

Présents : [Voir audience du 3 x 62; M. Koretsky, absent.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Koretsky lui aussi ne pourra pas assister à l'audience de ce matin pour raisons de santé. Il donne la parole à M. de Villiers pour la continuation de sa plaidoirie.

M. DE VILLIERS continue l'exposé reproduit en annexe [5].

(L'audience, suspendue à 12 h 55, est reprise à 16 heures.)

M. DE VILLIERS continue l'exposé reproduit en annexe [6].

L'audience est levée à 18 h 20.

[Signatures.]

QUARANTIÈME SÉANCE PUBLIQUE (9 X 62, 10 h 30)

Présents : [Voir audience du 8 x 62.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. de Villiers.

M. DE VILLIERS continue l'exposé reproduit en annexe [7].

(L'audience, suspendue à 12 h 45, est reprise à 16 heures.)

M. DE VILLIERS termine l'exposé reproduit en annexe [8].

L'audience est levée à 18 h 35.

[Signatures.]

QUARANTE ET UNIÈME SÉANCE PUBLIQUE (10 X 62, 10 h 30)

Présents : [Voir audience du 8 x 62.]

Le PRÉSIDENT ouvre l'audience.

M. VERLOREN VAN THEMAAT prie le Président de bien vouloir donner la parole à M. Muller, qui traitera de la troisième et de la quatrième exception préliminaire.

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[1] Voir pp. 76-93.
[2] Voir pp. 93-109.
[3] Voir pp. 109-125.
[4] Voir pp. 125-138.
[5] Voir pp. 138-154.
[6] Voir pp. 154-169.
[7] Voir pp. 169-184.
[8] Voir pp. 184-199.

The PRESIDENT called upon Mr. Muller.

Mr. MULLER began the speech reproduced in annex [1].

(The hearing was adjourned from 12.55 p.m. to 4 p.m.)

Mr. MULLER continued the speech reproduced in annex [2].

The Court rose at 6.25 p.m.

[Signatures.]

FORTY-SECOND PUBLIC HEARING (11 X 62, 10.30 a.m.)

Present: [See hearing of 8 x 62.]

The PRESIDENT opened the hearing and called upon Mr. Muller.

Mr. MULLER continued the speech reproduced in annex [3].

(The hearing was adjourned from 1 p.m. to 4 p.m.)

Mr. MULLER concluded the speech reproduced in annex [4].

The PRESIDENT asked the Agent for South Africa whether he desired to read the submissions of his Government.

Dr. VERLOREN VAN THEMAAT read the submissions of his Government, reproduced in annex [5].

The PRESIDENT asked the Agent for Ethiopia and Liberia when they would be able to begin their address.

Mr. GROSS replied that the Applicants would be prepared to commence their responsive statement on Monday, 15 October.

The PRESIDENT announced that the next hearing would take place on Monday, 15 October, at 10.30 a.m.

The Court rose at 6.15 p.m.

[Signatures.]

FORTY-THIRD PUBLIC HEARING (15 X 62, 10.30 a.m.)

Present: [See hearing of 8 x 62; Judges Wellington Koo and Morelli were absent.]

The PRESIDENT opened the hearing and announced that Judges Wellington Koo and Morelli would be unable to sit. He called upon the Agent of Ethiopia and Liberia.

Mr. GROSS made the speech reproduced in annex [6] and asked the President to call upon Mr. Moore.

The PRESIDENT called upon Mr. Moore.

Mr. MOORE began the speech reproduced in annex [7].

(The hearing was adjourned from 1 p.m. to 4 p.m.)

Mr. MOORE concluded the speech reproduced in annex [8].

The PRESIDENT called upon Mr. Gross.

Mr. GROSS began the speech reproduced in annex [9].

The Court rose at 6.25 p.m.

[Signatures.]

FORTY-FOURTH PUBLIC HEARING (16 X 62, 10.30 a.m.)

Present: [See hearing of 3 x 62; Judges Koretsky and Morelli were absent.]

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[1] See pp. 200-213.
[2] See pp. 214-229.
[3] See pp. 229-245.
[4] See pp. 246-259.
[5] See pp. 259-260.
[6] See pp. 261-263.
[7] See pp. 264-277.
[8] See pp. 277-280.
[9] See pp. 281-292.

Le PRÉSIDENT donne la parole à M. Muller.

M. MULLER commence l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h 55, est reprise à 16 heures.)

M. MULLER continue l'exposé reproduit en annexe [2].

L'audience est levée à 18 h 25.

[Signatures.]

QUARANTE-DEUXIÈME SÉANCE PUBLIQUE (11 X 62, 10 h 30)

Présents: [Voir audience du 8 x 62.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Muller.

M. MULLER continue l'exposé reproduit en annexe [3].

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

M. MULLER termine l'exposé reproduit en annexe [4].

Le PRÉSIDENT demande à M. l'agent de l'Afrique du Sud s'il désire lire les conclusions de son gouvernement.

M. VERLOREN VAN THEMAAT donne lecture des conclusions de son gouvernement reproduites en annexe [5].

Le PRÉSIDENT demande à l'agent de l'Ethiopie et du Liberia quand il pourra commencer sa plaidoirie.

M. GROSS répond que les demandeurs seront prêts à commencer leur plaidoirie en réponse le lundi 15 octobre.

Le PRÉSIDENT annonce que la prochaine audience aura lieu le 15 octobre à 10 h 30.

L'audience est levée à 18 h 15.

[Signatures.]

QUARANTE-TROISIÈME SÉANCE PUBLIQUE (15 X 62, 10 h 30)

Présents: [Voir audience du 8 x 62; MM. Wellington Koo et Morelli, absents.]

Le PRÉSIDENT ouvre l'audience et annonce que MM. Wellington Koo et Morelli, juges, sont empêchés de siéger aujourd'hui. Il donne la parole à l'agent de l'Éthiopie et du Libéria.

M. GROSS présente l'exposé reproduit en annexe [6] et demande au Président de bien vouloir donner la parole à M. Moore.

Le PRÉSIDENT donne la parole à M. Moore.

M. MOORE commence l'exposé reproduit en annexe [7].

(L'audience, suspendue à 13 heures, est reprise à 16 heures.)

M. MOORE termine l'exposé reproduit en annexe [8].

Le PRÉSIDENT donne la parole à M. Gross.

M. GROSS commence l'exposé reproduit en annexe [9].

L'audience est levée à 18 h 25.

[Signatures.]

QUARANTE-QUATRIÈME SÉANCE PUBLIQUE (16 X 62, 10 h 30)

Présents: [Voir audience du 3 x 62; MM. Koretsky et Morelli, absents.]

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[1] Voir pp. 200-213.
[2] Voir pp. 214-229.
[3] Voir pp. 229-245.
[4] Voir pp. 246-259.
[5] Voir pp. 259-260.
[6] Voir pp. 261-263.
[7] Voir pp. 264-279.
[8] Voir pp. 277-280.
[9] Voir pp. 281-282.

The PRESIDENT opened the hearing and called upon the Agent for Ethiopia and Liberia.

Mr. GROSS continued the speech reproduced in annex [1].

(The hearing was adjourned from 12.55 p.m. to 4 p.m.)

Mr. GROSS continued the speech reproduced in annex [2].

The Court rose at 5.40 p.m.

[Signatures.]

FORTY-FIFTH PUBLIC HEARING (17 X 62, 10.50 a.m.)

Present: [See hearing of 2 X 62; Vice-President Alfaro, Judges Koretsky and Morelli were absent.]

The PRESIDENT opened the hearing and announced that Judge Spiropoulos was unwell and would be unable to sit that morning. He called upon the Agent for Ethiopia and Liberia.

Mr. GROSS concluded the speech reproduced in annex [3].

The PRESIDENT announced that two Members of the Court, Judge Basdevant and Judge Sir Percy Spender wished to put questions to the Parties. He asked the Registrar to read out the question put by Judge Basdevant.

The REGISTRAR read the question put by Judge Basdevant and reproduced in annex [4].

The PRESIDENT called upon Sir Percy Spender.

Sir Percy SPENDER put the questions reproduced in annex [5].

The PRESIDENT asked the agent for South Africa when he would be ready to present his oral reply.

Dr. VERLOREN VAN THEMAAT said he would be ready on Friday morning. The answers to the questions, however, might take some time and he would know only on Friday whether additional time would be necessary.

The PRESIDENT took note of that reply and said that, provisionally, the next hearing would be fixed for Friday, 10.30 a.m.

The Court rose at 12.35 p.m.

[Signatures.]

FORTY-SIXTH PUBLIC HEARING (19 X 62, 10.50 a.m.)

Present: [See hearing of 2 X 62; Judge Morelli was absent.]

The PRESIDENT opened the hearing and announced that Judge Spiropoulos was unwell and would be unable to sit that day. He called upon the Agent for the Republic of South Africa to make his oral reply.

Dr. VERLOREN VAN THEMAAT asked the President to call upon Mr. de Villiers.

The PRESIDENT called upon Mr. de Villiers.

Mr. DE VILLIERS began the speech reproduced in annex [6].

(The hearing was adjourned from 12.55 p.m. to 4.20 p.m.)

Mr. DE VILLIERS concluded the speech reproduced in annex [7].

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[1] See pp. 292-306.

[2] See pp. 306-317.

[3] See pp. 317-326.

[4] See p. 326.

[5] See pp. 326-328.

[6] See pp. 329-345.

[7] See pp. 345-356.

Le PRÉSIDENT ouvre l'audience et donne la parole à M. l'agent de l'Ethiopie et du Libéria.

M. GROSS continue l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h 55, est reprise à 16 heures.)

M. GROSS continue l'exposé reproduit en annexe [2].

L'audience est levée à 17 h 40.

[Signatures.]

QUARANTE-CINQUIÈME SÉANCE PUBLIQUE (17 X 62, 10 h 50)

Présents: [Voir audience du 2 x 62; MM. Alfaro, Vice-Président, Koretsky et Morelli, absents.]

Le PRÉSIDENT ouvre l'audience et annonce que M. Spiropoulos, juge, est souffrant et ne pourra pas siéger ce matin. Il donne la parole à M. l'agent de l'Ethiopie et du Libéria.

M. GROSS termine l'exposé reproduit en annexe [3].

Le PRÉSIDENT annonce que deux membres de la Cour, M. Basdevant et sir Percy Spender, désirent poser des questions aux Parties et il invite le Greffier à donner lecture de la question posée par M. Basdevant.

Le GREFFIER lit la question posée par M. Basdevant, reproduite en annexe [4].

Le PRÉSIDENT donne la parole à sir Percy Spender.

Sir Percy SPENDER pose les questions reproduites en annexe [5].

Le PRÉSIDENT demande à l'agent de l'Afrique du Sud quand il pourra commencer la réplique orale.

M. VERLOREN VAN THEMAAT répond qu'il sera prêt à présenter sa réplique orale vendredi matin et qu'il pourra alors seulement dire quand il lui sera possible de répondre aux questions. Il se peut qu'il ait besoin d'un délai supplémentaire.

Le PRÉSIDENT lui donne acte de cette indication et annonce que, provisoirement, la prochaine audience aura lieu vendredi à 10 h 30.

L'audience est levée à 12 h 35.

[Signatures.]

QUARANTE-SIXIÈME SÉANCE PUBLIQUE (19 X 62, 10 h 50)

Présents: [Voir audience du 2 x 62; M. Morelli, absent.]

Le PRÉSIDENT annonce en ouvrant l'audience que M. Spiropoulos, juge, ne pourra pas siéger ce jour, étant souffrant. Il donne la parole à M. l'agent de la République sud-africaine pour sa réplique orale.

M. VERLOREN VAN THEMAAT demande au Président de donner la parole à M. de Villiers.

Le PRÉSIDENT donne la parole à M. de Villiers.

M. DE VILLIERS commence l'exposé reproduit en annexe [6].

(L'audience, suspendue à 12 h 55, est reprise à 16 h 20.)

M. DE VILLIERS termine l'exposé reproduit en annexe [7]. Après avoir

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[1] Voir pp. 292-306.
[2] Voir pp. 306-317.
[3] Voir pp. 317-326.
[4] Voir p. 326.
[5] Voir pp. 326-328.
[6] Voir pp. 329-345.
[7] Voir pp. 345-356.

After stating that he had completed his reply to the arguments of the Agent for Ethiopia and Liberia he added that, with regard to the questions put by Members of the Court, he hoped to be able to give his answers on Monday, 22 October. For that purpose, and that purpose alone, he asked the Court not to consider his reply as completed.

The PRESIDENT said that the next hearing would be on Monday, 22 October, at 10.30 a.m.

The Court would then hear the oral rejoinder of the Agent for Ethiopia and Liberia and the answers of the Parties to the questions put by Members of the Court.

The Court rose at 6 p.m.

[Signatures.]

FORTY-SEVENTH PUBLIC HEARING (22 X 62, 10.30 a.m.)

Present: [See hearing of 2 X 62; Vice-President Alfaro was absent in the afternoon.]

The PRESIDENT opened the hearing and indicated the procedure which had been decided upon by the Court; the Agent for Ethiopia and Liberia would first be called upon to present his oral rejoinder; next the Agent for South Africa and the Agent for Ethiopia and Liberia would be called upon in turn to give their answers to the questions put by Members of the Court; and finally, the Agents would be asked to say whether the questions and the answers given thereto led them to amend their Submissions, and, if so, to indicate the amendments.

The President called upon the Agent for Ethiopia and Liberia to present his oral rejoinder.

Mr. GROSS made the speech reproduced in annex [1].

The PRESIDENT called upon the Agent for the Republic of South Africa for the sole purpose of giving his answers to the questions put by Members of the Court.

Dr. VERLOREN VAN THEMAAT replied to the question put by Judge Basdevant [2].

The PRESIDENT called upon Mr. de Villiers.

Mr. DE VILLIERS replied to the questions put by Judge Sir Percy Spender [3].

(The hearing was adjourned from 12.55 p.m. to 4 p.m.)

Mr. DE VILLIERS concluded the replies to the questions put by Judge Sir Percy Spender [4].

The PRESIDENT called upon the Agent for Ethiopia and Liberia for his replies to the questions put by Members of the Court.

Mr. GROSS replied to the questions put by Judges Basdevant and Sir Percy Spender [5].

The PRESIDENT called upon the Agent for the Republic of South Africa.

Dr. VERLOREN VAN THEMAAT read the Submissions of his Government, as amended in the light of the answers to the questions put by Judge Sir Percy Spender [6].

The PRESIDENT asked the Agent for Ethiopia and Liberia whether he wished to amend his submissions.

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[1] See pp. 358-368.
[2] See p. 369.
[3] See pp. 369-375.
[4] See pp. 375-378.
[5] See pp. 379-381.
[6] See p. 382.

précisé que réponse a ainsi été donnée à la plaidoirie de l'agent de l'Ethiopie et du Libéria, il ajoute que, pour ce qui est des questions qui ont été posées par les membres de la Cour, il espère pouvoir être en mesure d'y répondre lundi. A cette fin, et à cette fin seulement, il demande à la Cour de ne pas considérer sa réplique comme terminée.

Le PRÉSIDENT annonce que la prochaine audience aura lieu lundi 22 octobre à 10 h 30. Elle sera consacrée à la duplique orale de l'agent de l'Ethiopie et du Libéria et aux réponses des Parties aux questions posées par les juges.

L'audience est levée à 18 heures.

[Signatures.]

QUARANTE-SEPTIÈME SÉANCE PUBLIQUE (22 X 62, 10 h 30)

Présents : [Voir audience du 2 X 62; M. Alfaro, Vice-Président, absent l'aprés-midi.]

Le PRÉSIDENT ouvre l'audience en exposant que la Cour a fixé la procédure suivante: la parole sera donnée à l'agent de l'Ethiopie et du Libéria pour sa duplique orale; la parole sera donnée ensuite à l'agent de l'Afrique du Sud puis à celui de l'Ethiopie et du Libéria pour répondre aux questions posées par les juges; enfin, dans le même ordre, les agents seront invités à faire savoir si ces questions et les réponses qui y ont été faites les amènent à amender leurs conclusions; ils pourront alors énoncer les amendements éventuels à leurs conclusions.

Le Président donne la parole à M. l'agent de l'Ethiopie et du Libéria pour sa duplique orale.

M. GROSS prononce l'exposé reproduit en annexe [1].

Le PRÉSIDENT donne la parole à M. l'agent de la République sud-africaine, uniquement pour répondre aux questions qui ont été posées par des Membres de la Cour.

M. VERLOREN VAN THEMAAT répond à la question posée par M. Basdevant [2].

Le PRÉSIDENT donne la parole à M. de Villiers.

M. DE VILLIERS répond aux questions posées par sir Percy Spender [3].

(L'audience, suspendue à 12 h 55, est reprise à 16 heures.)

M. DE VILLIERS termine la réponse aux questions posées par sir Percy Spender [4].

Le PRÉSIDENT donne la parole à l'agent de l'Ethiopie et du Libéria pour sa réponse aux questions posées par les membres de la Cour.

M. GROSS répond aux questions posées par M. Basdevant et par sir Percy Spender [5].

Le PRÉSIDENT donne la parole à l'agent de la République sud-africaine.

M. VERLOREN VAN THEMAAT donne lecture des conclusions de son gouvernement, amendées à la suite des questions de sir Percy Spender [6].

Le PRÉSIDENT demande à l'agent de l'Ethiopie et du Libéria s'il désire énoncer des amendements à ses conclusions.

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[1] Voir pp. 358-368.
[2] Voir p. 369.
[3] Voir pp. 369-375.
[4] Voir pp. 375-378.
[5] Voir pp. 379-382.
[6] Voir p. 382.

Mr. GROSS stated that the Applicants did not desire to amend their Submissions; they wished however to reserve their right to comment on the amended Submissions of the Respondent. If, upon study within a short time-limit set by the Court, he decided not to submit any comments, he would immediately advise the Court through the Registrar.

The PRESIDENT said that in these circumstances he would not close the oral proceedings, and the Agents for the Parties were requested to remain at the disposition of the Court to furnish any further clarification that might be desired.

The Parties would be informed of the decision of the Court concerning a further hearing.

The Court rose at 5.05 p.m.

[Signatures.]

FORTY-EIGHTH PUBLIC HEARING (21 XII 62, 9.30 a.m.)

Present: President WINIARSKI; *Vice-President* ALFARO; *Judges* BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, BUSTAMANTE Y RIVERO, JESSUP, MORELLI; Sir Louis MBANEFO, The Honourable J. T. VAN WYK, *Judges* ad hoc; M. GARNIER-COIGNET, *Registrar.*

Also present:

For the Governments of Ethiopia and Liberia:

Mr. Ernest A. GROSS, Member of the New York Bar, *as Agent and Counsel.*

For the Government of the Republic of South Africa:

Dr. J. P. VERLOREN VAN THEMAAT, S.C., Law Adviser to the Department of Foreign Affairs, *as Agent.*

The PRESIDENT opened the hearing and declared that the Court was meeting today to deliver its Judgment on the Preliminary Objections raised by the Government of the Republic of South Africa in the South West Africa cases brought before the Court by the Applications of the Government of the Empire of Ethiopia and the Government of the Republic of Liberia.

He regretted to announce that Judge Tanaka, who sat during the oral proceedings and who participated in a great part of the deliberations of the Court in these cases was unfortunately unable to take part in the final stages of the work on the present Judgment because of a serious illness.

He read the French text of the Judgment.

The PRESIDENT called upon the Registrar to read the operative provision of the Judgment in English.

The REGISTRAR read the English text of the operative provision.

The PRESIDENT announced that Judge Spiropoulos had appended a Declaration to the Judgment of the Court. Judges Bustamante y Rivero and Jessup and Judge *ad hoc* Sir Louis Mbanefo had appended Separate Opinions to the Judgment of the Court. The President and Judge Basdevant had appended Dissenting Opinions to the Judgment of the Court; Judges Sir Percy Spender and Sir Gerald Fitzmaurice had

M. GROSS déclare que les demandeurs ne désirent pas amender leurs conclusions; toutefois, ils voudraient se réserver le droit de présenter des commentaires sur les conclusions amendées par le défendeur. Si, après étude des conclusions amendées dans un délai qu'il demande à la Cour de bien vouloir fixer, il décide de ne formuler aucun commentaire, il en informera immédiatement la Cour par l'entremise du Greffier.

Le PRÉSIDENT déclare que, dans ces conditions, il ne prononce pas la clôture des débats et prie les agents des Parties de se tenir à la disposition de la Cour pour le cas où celle-ci voudrait leur demander des éclaircissements supplémentaires.

Les Parties seront avisées de la décision de la Cour en ce qui concerne l'audience éventuelle.

L'audience est levée à 17 h 5.

[Signatures.]

QUARANTE-HUITIÈME SÉANCE PUBLIQUE (21 XII 62, 9 h 30)

Présents: M. WINIARSKI, *Président;* M. ALFARO, *Vice-Président;* MM. BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, MM. KORETSKY, BUSTAMANTE Y RIVERO, JESSUP, MORELLI, *Juges;* Sir Louis MBANEFO, M. J. T. VAN WYK, *Juges* ad hoc; M. GARNIER-COIGNET, *Greffier.*

Présents également:

Pour les Gouvernements éthiopien et libérien:

M. Ernest A. GROSS, membre du barreau de New York, *comme agent et conseil.*

Pour le Gouvernement sud-africain:

M. J. P. VERLOREN VAN THEMAAT, S.C., conseiller juridique du département des Affaires étrangères, *comme agent.*

Le PRÉSIDENT ouvre l'audience et expose que la Cour se réunit aujourd'hui pour rendre son arrêt sur les exceptions préliminaires soulevées par le Gouvernement de la République sud-africaine en les affaires du Sud-Ouest africain, introduites devant la Cour par requêtes du Gouvernement de l'Empire d'Ethiopie et du Gouvernement de la République du Libéria.

Il regrette d'annoncer que M. Tanaka, qui a été présent sur le siège pendant la procédure orale et avait pris part à une grande partie des délibérations, n'a malheureusement pas pu participer aux dernières phases du travail sur le présent arrêt en raison d'une grave maladie.

Il donne lecture du texte français de l'arrêt.

Le PRÉSIDENT invite le Greffier à donner lecture du dispositif de l'arrêt en langue anglaise.

Le GREFFIER lit le dispositif en anglais.

Le PRÉSIDENT annonce que M. Spiropoulos, juge, a joint à l'arrêt une déclaration. MM. Bustamante y Rivero et Jessup, juges, et sir Louis Mbanefo, juge *ad hoc,* y ont joint les exposés de leur opinion individuelle. Le Président et M. Basdevant, juge, y ont joint les exposés de leur opinion dissidente; sir Percy Spender et sir Gerald Fitzmaurice, juges, y ont joint l'exposé commun de leur opinion dissidente; MM.

appended their Joint Dissenting Opinion to the Judgment of the Court; Judge Morelli and Judge *ad hoc* van Wyk had appended Dissenting Opinions to the Judgment of the Court.

The Court rose at 10.45 a.m.

(Signed) B. WINIARSKI,
President.
(Signed) GARNIER-COIGNET,
Registrar.

Morelli, juge, et van Wyk, juge *ad hoc*, y ont joint les exposés de leur opinion dissidente.

L'audience est levée à 10 h 45.

Le Président,
(Signé) B. WINIARSKI.
Le Greffier,
(Signé) GARNIER-COIGNET.

1. ARGUMENT OF Dr. VERLOREN VAN THEMAAT

(AGENT OF THE GOVERNMENT OF SOUTH AFRICA)
AT THE PUBLIC HEARING OF 2 OCTOBER 1962

Mr. President and Members of this Honourable Court.

I have the honour to present Mr. de Villiers, first on my right, and Mr. Muller, second on my right, Senior Counsel of the Supreme Court of South Africa, who are appearing as Counsel for the Republic of South Africa in these proceedings, and Mr. McGregor, fourth on the right, Deputy State Attorney, Transvaal, who is joint Agent of the Government of the Republic with myself. Also Mr. Botha, third on the right, Adviser, of the Department of Foreign Affairs of the Republic of South Africa.

Permit me, on behalf of my colleagues and myself, to express our appreciation of the privilege of appearing before this eminent tribunal, the Court of nations, which has already made such a marked contribution towards the establishment and advancement of an international legal order. Respect for legal institutions and for judicial independence is part of the strongest traditions of our nation, a precious heritage from the English and the Roman-Dutch origins of our legal system.

We have, in this case, the situation that some of the contentions advanced by us urge a departure in certain respects from conclusions arrived at in this Court in earlier advisory proceedings. That this involves or implies no disrespect for the Court or any of its Members will, I hope, be evident from what I have already stated. Indeed, we trust that our great respect will be apparent from the very grounds upon which we advance these contentions.

Our oral statement will deal with the four Preliminary Objections, filed by the Government of the Republic of South Africa on 30 November 1961, and with the Observations filed by the Governments of Ethiopia and Liberia on 1 March 1962. For the sake of convenience, the Governments of Ethiopia and Liberia will hereafter usually be referred to as the Applicants, and the Government of the Republic of South Africa as the Respondent.

Our Preliminary Objections submit that the Applicants have no *locus standi* in these proceedings, and that the Court consequently has no jurisdiction, because:

Firstly, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is no longer a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court;

Secondly, neither of the Applicants is any longer "another Member of the League of Nations" as Article 7 of the Mandate for South West Africa requires for *locus standi;*

Thirdly, no *dispute* in the sense contemplated by Article 7 of the Mandate is involved in the matters presented by Applicants for adjudication by the Court; and

Fourthly, there is, in any event, no "dispute" which cannot "be settled by negotiation" within the meaning of Article 7.

If the Court pleases, Mr. de Villiers will deal mainly with the First and Second Objections and Mr. Muller with the Third and Fourth.

In the presentation of our oral statements we shall not repeat what is already recorded in our written Objections, except where this is considered necessary for special reasons such as further explanation, development of argument, continuity, clarity, particular emphasis or the like. Further, in our oral statements as in our written Objections, we shall confine ourselves to matters relevant to the Objections, and shall not deal with allegations made in the pleadings of the Applicants regarding matters which do not concern the jurisdictional issues.

Before Counsel deal specifically with the Objections, I would like to deal briefly in this introductory statement with three matters. They are:

In the first place, an explanation of the attitude which we adopt, for the purposes of the argument in these Objections, and in so far as is relevant thereto, regarding the status of South West Africa in general.

In the second place, the general principles which we submit to be applicable in a situation where arguments advanced in contentious proceedings are at variance with a previous Advisory Opinion.

In the third place, certain relevant aspects of the history of Article 22 of the Covenant of the League of Nations and the Mandate for South West Africa which are material for the purpose of a proper appreciation of some of our arguments.

Mr. President, concerning the first of the three matters which I have mentioned, the status of South West Africa in general, I refer to paragraph D of Chapter I at page 214 (I) of our Preliminary Objections where our attitude in that regard is outlined.

We state there that our submissions under the first Objection concern only the Mandate *as an agreement;* our contention being that *as a treaty or convention* the Mandate is no longer in force. We state further that no submissions are advanced about the question whether the Mandate in the wider sense of being an institution survived the League or not. The logical effect of this attitude is that, although we make no admissions in that regard, we are prepared for the purposes of our argument in these Objections to assume that the Mandate as an institution survived the League.

Our contention as aforestated, and Applicants' comments with regard to the contemplated distinction between the Mandate as an institution and the Mandate as a treaty or convention, will be dealt with fully in the argument by Counsel on the First and Second Objections. We shall show in that regard that Applicants are quite wrong in representing that, in arguing on the premise I have just indicated, we are now advancing the same basic contention as in the advisory proceedings in 1950.

The second matter with which I wish to deal concerns the general principles of approach in contentious proceedings towards a previous advisory opinion with regard to the same subject-matter.

We respectfully advance two general propositions in that regard.

The first is that although an advisory opinion will always command great respect and *prima facie* authoritative weight as an expression of the views of an eminent tribunal, the Court will never refuse to reconsider conclusions reached in a previous advisory opinion, save perhaps where a request for such reconsideration is frivolous or vexatious. This seems, with respect, an obvious proposition which does not need motivation. It seems sufficient to cite in support of this proposition the following passage from Manley O. Hudson in his work *The Permanent*

Court of International Justice, New York, 1943, on page 512. He states as follows:

> "Nor is the Court itself bound to adhere to conclusions reached in an advisory opinion. If the question upon which an opinion is given is later submitted to the Court for judgment, the matter is not *res judicata;* and though an opinion may be cited as a precedent, the Court is not bound to abide by the conclusions stated in the opinion."

Our second proposition is that where sound reasons are established, the Court will depart from a previous opinion. This also, with respect, seems an obvious proposition. It is implicit in the decision of the Court in the *Upper Silesia* case, from which Applicants quote at page 420 **(I)** of their Observations. The Court in that case affirmed a view previously expressed in an advisory opinion because—and I quote from the case concerning *German Interests in Upper Silesia*, P.C.I.J., Series A, No. 7, 1926, at page 31:

> "Nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion on this point."

Clearly, the Court did not intend to formulate any general rule of practice, as is suggested by Applicants on page 103 **(I)** of their Memorials, and repeated on page 420 **(I)** of their Observations, where they used the words "the practice of the Permanent Court in Upper Silesia". The Court merely stated its finding and its decision *in that particular case.* The statement implies that, where good reasons *are* established, the Court *will* depart from a previous advisory opinion.

We do not wish to suggest any general and comprehensive rules as to when the Court will consider that there are sound reasons justifying a departure from a previous advisory opinion. In our submission, this is a matter which must largely depend upon the particular circumstances of each case. The Court would naturally give an advisory opinion all due weight as an authority and as an expression of the considered views of the learned Judges of the Court. But if it considers in subsequent contentious proceedings that good reasons exist for a different conclusion, our contention is that the Court would not hesitate to depart from the conclusions in the advisory proceedings.

On page 98 **(I)** of the Memorials, Applicants suggest the existence of a so-called "principle" or "doctrine of Eastern Carelia", namely "that an advisory opinion as to a dispute is substantially equivalent to deciding the dispute".

In our submission no such general "principle" or "doctrine" was laid down in the Advisory Opinion of 23 July 1923 concerning the *Status of Eastern Carelia.* It is reported in P.C.I.J., Series B, No. 5.

In that case the Council of the League of Nations requested an advisory opinion from the Court as to whether a Treaty entered into between Russia and Finland and a Declaration made by Russia at the same time constituted engagements of an international character which placed Russia under an obligation to Finland. Finland contended that the Declaration was part of the agreement with Russia. Russia maintained that the Declaration was not by way of contract, but was only declaratory of an existing situation and made merely for information.

The Court found that an Advisory Opinion on the question asked by the Council of the League of Nations would have to embody a finding on facts which were in dispute between Finland and Russia. Russia, who was not a member of the League of Nations at the time, refused to take part in the advisory proceedings.

In the circumstances, the Court declared that it would be at a very great disadvantage at an enquiry into the disputed facts. The Court said:

> "It appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any *judicial conclusion upon the question of fact:* what did the parties agree to? The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.
>
> The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. *The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties.* The Court being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their *activity as a Court.*"

I quote from pages 28 and 29 of the *Report.*

The opinion as a whole indicates that the passage "Answering the question would be substantially equivalent to deciding the dispute" was intended to refer to the particular case and was not intended to lay down any general rule, or to formulate a general principle or doctrine. Furthermore, it related purely to the Court's "activity" as a judicial tribunal in investigating the matter with a view to coming to a "judicial conclusion upon the question of fact". Nothing was said or implied regarding the weight to be attached to such conclusions in possible later contentious proceedings.

In the Memorials on page 98 **(I)** the Applicants also state that in the *Peace Treaties* case:

> "Majority and dissenting opinions alike recognized implicitly or explicitly the principle of *Eastern Carelia,* namely that an advisory opinion as to a dispute is substantially equivalent to deciding the dispute."

This refers to the case *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Advisory Opinion, *I.C.J. Reports 1950,* pages 65 and following.

Again, in our submission, there is no justification for this statement of Applicants.

Although some of the minority Judges in the *Peace Treaties* case seem to have held the view that some general rule was formulated in the

Eastern Carelia case as to the effect of and weight to be attached to advisory opinions, that was not the view of the majority in the *Peace Treaties* case.

The majority opinion in the last-mentioned case merely distinguished the two cases, holding that the *Eastern Carelia* case was profoundly different for two reasons—firstly, because the question put to the Court in that case "was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties". And secondly, because "at the same time it raised a question of fact which could not be elucidated without hearing both parties". Both quotations are from page 72 of the *Report.*

There is nothing in the opinion of the majority in the *Peace Treaties* case which justifies a conclusion that the majority Judges interpreted the *Eastern Carelia* case as laying down any general rule, principle or doctrine regarding the effect or weight of advisory opinions or which justifies a conclusion that they gave recognition to any such general rule, principle or doctrine.

In effect, the majority opinion in the *Peace Treaties* case refutes the very existence of any such general rule, principle or doctrine. That is why writers who interpret the *Eastern Carelia* case as laying down such a rule, principle or doctrine, consider that case to have been overruled by the *Peace Treaties* case.

In this respect, we wish to refer to Lauterpacht in his work *The Development of International Law by the International Court,* 1958, where the learned author states that the Advisory Opinion in the *Eastern Carelia* case—and I quote from page 248—"can no longer be regarded as a precedent of authority", and I quote from page 358, "can no longer be accepted as expressing a valid legal proposition", and that the case was—and I quote again from page 358—"not followed, in fact, in the Advisory Opinion on the Interpretation of Peace Treaties".

Mr. President, I come now to the third and last matter I wish to deal with. It concerns relevant aspects of the history of Article 22 of the Covenant of the League of Nations and of the Mandate Agreement for South West Africa.

There is a reason why I invite special attention to and the consideration of this chapter in the history of the Mandates system.

The cases before the Court are concerned, primarily at least, with a proper construction of Article 22 of the Covenant and of the Mandate instrument.

In the task of ascertaining the true intentions of the parties to these instruments, the circumstances surrounding the creation of the Mandates System and the conclusion of the Mandate Agreement, as well as the conduct of the parties concerned, both at the time and thereafter, are matters of great importance.

With a view to a proper appraisal of such circumstances and of the conduct of the parties, Chapter II of our written Objections is devoted to an analysis of history in so far as we consider necessary for the purposes of our Objections, and for the purposes of demonstrating that certain allegations made by the Applicants regarding the historical background are either unfounded or inaccurate.

In answer to our historical analysis, Applicants state at page 421 (I) of their Observations, that their own account of the relevant historical facts is a fair account and "has not been materially altered in Respondent's version".

This answer by Applicants must mean that they do not dispute Respondent's analysis of the relevant historical facts.

Proceeding upon that basis, it is unnecessary for us to spend any further time in demonstrating the particular respects in which we contend that the account of the historical facts as set forth in Applicants' Memorials is not correct. Our submissions in that regard have already been made in the written Objections and are not attacked by the Applicants in their Observations.

In the course of the statements by Counsel for Respondent, reference will be made to various historical facts relevant to their arguments. I, however, propose to deal in this introductory statement only with the history of Article 22 of the Covenant and of the Mandate instrument with particular reference to the compromise aspect of the arrangement whereby the C Mandates were established.

To avoid confusion as to the sense in which we use the word "compromise" it is necessary at the outset to state our understanding of the meaning of that term.

It can only be in a very loose sense that the term "compromise" can be employed to denote the procedure of offer and counter-offer often followed in coming to terms. In that unusual sense the term may lend itself to the contention put forward by Applicants on page 423 (I) of their Observations that: "nearly all agreements arise from compromise".

We, however, employ the word in the more exact sense of a give and take arrangement in the settlement of conflicting claims and interests regarding the same subject-matter, for instance the settlement of a Court action.

It is in this sense that the arrangements at the Paris Peace Conference regarding the former German colonies, and particularly those that became C Mandated territories, constituted a compromise. It involved a measure of give and take in the settlement of conflicting claims regarding the future status of the said colonies.

There was at the Conference a marked conflict with regard to the future of the former German colonies in New Guinea, Samoa and South West Africa. Australia, New Zealand and South Africa put forward respective claims for the annexation of those territories of which they were then in occupation, whereas President Wilson of the United States of America strongly advocated the application of a policy of "no annexations" to all the former German colonies.

In consequence of the conciliatory role played by the British and South African Prime Ministers in order to avoid a deadlock, a compromise was arrived at. The effect of the compromise was that there would be no annexations. All the German colonial possessions were brought into the Mandates system. But for that to come about certain important concessions had to be made to the States which were in occupation of certain of those possessions and particularly so in the case of Australia, New Zealand and South Africa in respect of New Guinea, Samoa and South West Africa, which became the so-called C mandated territories.

The States in question did not press their claims for out and out annexation but obtained in return a modified Mandate system which

involved abandonment on President Wilson's part of certain important aspects of his proposals concerning League supremacy and control of Mandate administration. These proposals were contained in "Supplementary Agreements" to his Second and Third Drafts of the Covenant of the League of Nations. They are referred to on page 218 (I) of our Preliminary Objections and quoted verbatim by Baker in his work *Woodrow Wilson and World Settlement* (1922-23), Vol. III, pages 108 to 129.

Thus, for example, in the Mandates system as eventually agreed upon:

Firstly, Mandatories were to be *individual States* to whom the Mandates were to be allocated by the Principal Allied and Associated Powers, and in the case of the C Mandates the allocation would have to be to the adjacent claimant States.

This was a radical departure from the proposal which President Wilson formulated as follows—I read from Baker, page 109, paragraph II of the Supplementary Agreements to the Second and Third Drafts of the Covenant. Both of them read exactly the same. This second paragraph reads as follows:

> "Any authority, control or administration which may be necessary in respect of these peoples or territories other than their own self-determined and self-organized autonomy shall be the exclusive function of and shall be vested in the League of Nations and exercised or undertaken by or on behalf of it.
>
> It shall be lawful for the League of Nations to delegate its authority, control, or administration of any such people or territory to some single State or organized agency which it may designate and appoint as its agent or mandatory; but whenever or wherever possible or feasible the agent or mandatory so appointed shall be nominated or approved by the autonomous people or territory."

Secondly, the relationship between the League and the Mandatories were in each case regulated by a Mandate agreement. Alteration of the provisions of the agreement would normally require *mutual* consent.

This stands in sharp contrast to the following proposal of President Wilson—I read the first paragraph of paragraph III, of his Second Draft of the Covenant of the League of Nations; the third Draft reads exactly the same, with one small alteration which I will indicate:

> "III. The degree of authority, control, or administration to be exercised by the mandatory State or agency shall in each case be explicitly defined by the League [for 'League' in the Third Draft the words 'Executive Council' were substituted; then the quotation continues] in a Special Act or Charter which shall reserve to the League complete power of supervision and of intimate control and which shall also reserve to the people of any such *territory or governmental unit the right to appeal to the League* for the redress or correction of any breach of mandate by the mandatory State or agency or for the substitution of some other State or agency as mandatory."

Thirdly, in the case of the C Mandates, the Mandatories were to have powers to administer the territories as integral portions of their

own, and the open door principle was excluded. Also in these respects there was a radical departure from President Wilson's proposals, resulting in fairly widespread comment that the arrangements regarding C Mandates were in their effect not far removed from annexation. We dealt with this on pages 221-222 **(I)** of our Preliminary Objections.

Where a party makes concessions in a compromise agreement, the natural inference would be that the concessions are not intended to extend beyond the express terms of the agreement. It is in this respect that the compromise origin of the Mandates system is material and of special significance for the purposes of these Objections.

That compromise origin, in Respondent's submission, indicates at least a strong probability that there could have been no common intention that Respondent should be subject to any obligations different from or in addition to those expressly undertaken in terms of Article 22 of the Covenant and the Mandate instrument.

Hardly stronger demonstration of this probability can be afforded than by the statements of the Prime Ministers of the United Kingdom, Australia, New Zealand and South Africa made when the draft which eventually became Article 22 was proposed. Mr. Lloyd George, the British Prime Minister, stated that

> "... it was only with the greatest difficulty that the representatives of the Dominions had been prevailed upon to accept the draft submitted, even provisionally",

and a little later:

> "... they had accepted his proposals, but only as a compromise"

(this quotation comes from the work *Foreign Relations of the United States: The Paris Peace Conference, 1919*, Volume III, on page 790). And Mr. Hughes of Australia, speaking for Australia and New Zealand, made it clear: "For the present that represented the maximum of their concession" (as quoted in our Preliminary Objections, page 219 **(I)**, footnote 6). General Botha, the Prime Minister of the Union of South Africa, said he was prepared to agree to the compromise because the

> "... League of Nations would consist mostly of the people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country"

(as quoted on page 220 **(I)** of our Preliminary Objections).

Applicants say at page 423 **(I)** of their Observations that they "do not conceive it material to the instant cases to argue the exten t to which the Mandate arose from compromise". However, *à propos* of our statements regarding the compromise, they proceed to propound on pages 422-424 **(I)** of their Observations a lengthy argument on the question whether Respondent is entitled to annex or incorporate South West Africa. That question is entirely irrelevant in the instant cases and was not touched upon in the written Objections. We did state in our written Objections that a progressive closer association between South West Africa and South Africa was a normal development and within the contemplation of the parties concerned. Furthermore, we did refer to commentators who held that C Mandates were, in their practical effect, not far removed from annexation.

In neither respect, however, did we raise any question about annexation, which is irrelevant to the present proceedings and does not therefore require to be dealt with by us.

Mr. President, I thank you. This concludes my oral statement and, if the Court pleases, after the translation Mr. de Villiers will address the Court on the First and Second Objections.

2. ARGUMENT OF Mr. DE VILLIERS

(COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA)
AT THE PUBLIC HEARINGS OF 2 TO 9 OCTOBER 1962

[Public hearing of 2 October 1962, afternoon]

Mr. President and Honourable Members of this Court.

I would like to begin by associating myself, as Counsel, with the respects that have so fittingly been paid to the Court and to you by my learned friend and Agent, Dr. verLoren van Themaat. It is indeed a privilege to appear before this eminent tribunal; and I hope that the contribution we may be able to make will prove to be of some assistance to the Court in a matter which, with respect, can probably not be regarded as being without difficulty.

In arguing, Mr. President, in support of the First and the Second Objections, I shall not endeavour to keep the argument relevant to one of them entirely separate from the argument relative to the other—in watertight compartments, as it were. There is a great deal of common ground between these two Objections and I shall argue that common ground as being applicable to both of the Objections. I shall indicate the distinction between the two as that emerges. In fact, Mr. President, that distinction will be found to emerge largely, although not entirely, in the drawing of alternative conclusions from what is essentially a common line of argument. I shall endeavour to demonstrate that in more detail at a later stage.

I propose to devote a brief introductory portion of my argument to an analysis, in very broad outline, of the major rival contentions of the Parties in regard to the First and the Second Objections, and thus also of the issues between the parties—the major issues—regarding those two Objections. In stating for that purpose what our major contentions are I shall not at this stage argue in support of those contentions—that will come later. Similarly, in stating what the contentions or answers of the Applicants are to our contentions, I shall not be arguing in reply to those contentions—that will also come later. My purpose at the moment is merely a very broad survey of the area of dispute.

Now, my learned friend, Dr. van Themaat, has referred to the wording of our four Objections and I am not going to read the first and the second to the Court again—they are well known to the Court. The first concerns the proposition that as a result of the dissolution of the League the Mandate Agreement, as a whole, including Article 7, has ceased to be a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. The second one concerns the proposition that the Applicants are unable to bring themselves within the expression "another Member of the League of Nations" for purposes of Article 7 of the Mandate Agreement. I wish to point out at this stage that there are, in effect, three alternative contentions wrapped up in these First and Second Objections. The Applicants, judging by

the way in which they have dealt with these Objections in their Observations, appear to realize that and I propose to state those three alternatives to the Court in a moment. But, before doing so, I would like to refer—just for purposes of background and perspective—to the foundation of the Applicants' case regarding jurisdiction. It is for the Applicants to satisfy the Court that in terms of operative consent on the Respondent's part this Court has jurisdiction in the instant cases, that is both in regard to the subject-matter of these cases and in regard to the Parties who are seeking to bring the cases before the Court. The Applicants rely in this regard on Article 7 of the Mandate Agreement and on Article 37 of the Statute of the Court. They say so specifically in their Memorials at page 88 **(I)**. At the beginning of their Chapter III they say: "The Applicant *founds* the jurisdiction of the Court on Article 7 of the Mandate and Article 37 of the Statute of the International Court of Justice." They go on to say "having regard to Article 80, paragraph 1, of the United Nations Charter". But in regard to this last portion the Applicants nowhere explain in what way Article 80, paragraph 1, of the Charter could be said to be relevant or helpful in this regard at all. They do not explain that anywhere in the written proceedings. Possibly we will hear the explanation in the course of their oral statements and, if so, I could then deal with it. But for the moment I will refrain from dealing with a suggestion which I frankly don't understand. I don't know what it is intended to connote. I will confine myself at this stage to those two provisions upon which the Applicants say that they *found* jurisdiction; the first one being Article 7 of the Mandate Agreement which is well known to the Court. I would like to read it, though, for purposes of emphasis on a particular element. Reading from page 88 **(I)** of the Applicants' Memorial:

> "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

Now, Mr. President, I would like to stress the two elements—that the dispute must be between the Mandatory and "another Member of the League of Nations", and secondly, that the provision there is for reference of a dispute as defined to "the Permanent Court of International Justice". In regard to this latter aspect, a substitution of courts is provided for as between signatories to the Statute in Article 37 of the Statute of the Court, but subject to certain prerequisites. It is for that purpose that I read also Article 37:

> "Whenever a treaty or convention in force provides for reference of a matter to a Tribunal to be instituted by the League of Nations or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

I stress, Mr. President, the prerequisite that the reference of the matter to the Permanent Court should be provided for in "a treaty or convention in force". The two elements which I have respectfully

stressed in these two provisions—these two Articles—relied upon by the Applicants, those are the two focal points of our First and our Second Objections. Firstly, the requirement in Article 37 that the reference must be provided for in a treaty or convention in force and, secondly, the requirement in Article 7 of the Mandate itself that the dispute must be as between the Mandatory and another Member of the League of Nations.

In essence, Mr. President, our main contentions regarding the first two Objections flow from one basic consideration and that is that, as a result of the dissolution of the League of Nations there now no longer exists a League of Nations and there no longer exists any Member of the League of Nations. This, in our submission, has for the purposes under discussion various effects. The first one is that we sumbit that on a true construction of the Mandate Agreement, the only parties between whom it was intended to operate as a treaty or convention, as an international agreement, were the Mandatory on the one hand, and on the other hand, depending on how one looks at it, either the League of Nations—seen as a legal *persona*—or the Members of the League of Nations, or the League *and* its Members. But these possibilities exhaust the circle, in our submission. It could be any of those alternatives, but the circle is confined to the Mandatory on the one hand and the League and/or its Members on the other hand. Our first contention then is that on dissolution of the League and upon there ceasing to be a League and Members of the League, there also ceased to be a treaty or convention in force, as far as the Mandate arrangement is concerned. Because all the parties on the one hand fell away—there was no longer a League, there were no longer Members of the League and all that remained as far as parties to an agreement were concerned was the Mandatory on the other hand. And, consequently, our first contention is that—

> "on dissolution of the League the whole Mandate Agreement—and thus including Article 7 thereof—ceased to be a treaty or convention in force within the meaning of Article 37 of the Statute of the Court".

Secondly, Mr. President, we submit that certain of the provisions of the Mandate agreement were dependent, as to their contents, upon there existing a League of Nations and upon there being in existence Members of the League of Nations. And, consequently, because of being so dependent, they became completely inoperative, incapable of performance upon dissolution of the League. We submit that that applies particularly to Article 6 of the Mandate Agreement which provided for reporting by the Mandatory to "the Council of the League of Nations ... to the satisfaction of the Council". We submit upon there no longer being a League of Nations, and no longer being a Council of the League of Nations, that provision became incapable of performance. And, secondly, then, and specifically important for our purposes of jurisdiction, Article 7, which provided, in the first place, for modification of the terms of the Mandate, with the consent of the Council of the League. Again with the Council playing a necessary part for the purposes of that provision, it became incapable of operation on dissolution of the League; and then the second portion of Article 7 providing for compulsory jurisdiction in disputes between the Mandatory and "another Member of the League of Nations". There again, upon there no longer being another Member of the League

of Nations there could be no party to invoke—no State with the necessary competence to invoke—this Article and it became inoperative.

So our second contention is that—

> "even if the Mandate could, in other respects, be said to be still in force as a treaty or convention within the meaning of Article 37 of the Statute, Article 7 of the Mandate itself ceased to be so in force".

Thirdly, Mr. President, on basically the same argument as applies to our second contention, namely that another Member of the League of Nations is necessary for operation of Article 7, there follows our third contention which is merely an alternative way of putting the same argument and that is that—

> "even if the Mandate, including Article 7 thereof, could be said to be 'a treaty or convention in force', neither of the Applicants is qualified to invoke it as 'another Member of the League of Nations' within the meaning thereof".

And it is mainly because of the overlapping between the second contention—which is really still part of our First Objection—and this third contention which is our Second Objection—it is mainly because of that overlapping that I trust the Court will find it convenient if I carry on as I propose and that is to deal with these two Objections together and not to separate them entirely. I would like to point out that the three alternative contentions, as I have now put them to the Court, are nowhere exactly so stated in writing in the Pleadings before the Court. They are covered by the First and Second Objections but they are nowhere exactly so stated and I thought it may be convenient to the Court if I should, at this stage, hand in for each Member of the Court a sheet of paper on which I have set them out in the wording exactly as I have now stated them to the Court. Our learned friend has indicated that he has no objection and the copies are available for the Court. I have handed copies to him already.

Le PRÉSIDENT: Si je comprends bien, ce sont des conclusions que vous avez communiquées à M. le Greffier et à la Partie adverse? Ou bien s'agit-il d'un résumé de votre argumentation?

Mr. DE VILLIERS: No, Mr. President, they are not the formal submissions or conclusions which I understand are normally handed in at a later stage of the argument, in the practice of this Court. They are merely a summary of the three main contentions which we advance under the heading of the First and the Second Objections and I hand them in merely for purposes of convenience of the Court at the moment, for purposes of analysis and the following of the further argument.

Mr. President, on analysis of the three contentions as they are now before the Court, I may possibly be asked the question "But now, why is the first one necessary if either the second or the third should be sound?" In other words, the question is "Isn't there a measure of overlapping between these contentions?", and I must admit that there is. It is not necessary for me to go so far, for purposes of an argument concerning jurisdiction, as to satisfy the Court that the whole of the Mandate Agreement ceased to be a treaty or convention in force if I could satisfy the Court that the crucial, compromissory clause, Article 7, ceased to be so in force as a treaty or convention.

But, Mr. President, the first contention, as compared with the second and third—those two are not strictly alternatives; they are distinct lines

of argument, and I submit that they are both sound. They represent various facets of one and the same problem, namely, the effect which the dissolution of the League had on the pre-existing relationships regarding the Mandate, and considerable light is thrown on other facets when each one of them is dealt with. I propose therefore to deal with each one fully, and to put all those contentions to the Court because, as I have said, in dealing with one facet considerable light is thrown also on the other facets. A proper appreciation of the issues and the questions involved is thereby assisted.

Now, having stated to the Court in broad outline what our main contentions are, relative to the First and Second Objections, I turn to the Applicants' response, again, as I have said, by way of broad outline. Their response, in the first place, is to point out that our contentions as we now advance them are in important respects at variance or in conflict with conclusions arrived at by the Court, or by Members of the Court, in the Advisory proceedings of 1950. Now that is, of course, a difficulty which we have to face squarely. And we do so, Mr. President, with the greatest respect, by contending that we are now presenting to the Court certain material, factual and otherwise, of very great importance which was not before the Court in 1950 and which, had it been before the Court in 1950, could have made all the difference to the conclusions eventually arrived at in the majority Opinion. We submit, therefore, that this is one of those highly exceptional cases where, although the issues may now in form appear to be still the same as they were in 1950, they are in substance really different—really different questions for this Court to decide, because the factual material to which this Court has to apply the law is different from the factual material that was before the Court in 1950. I need not ask this Court to perform the invidious function of preferring its own reasoning to that of an earlier tribunal because, as I have said, in essence and in substance, because of the difference in the factual material, the issues are now different. The task to be performed by the Court is in substance a different one.

Those are broadly our submissions on that question. The Applicants dispute our contention that they are good and sufficient reasons for a departure from the Opinion of 1950, and those issues then between us and the Applicants will have to be dealt with fully at a later stage in the argument.

Further, Mr. President, in regard to our first contention, the Applicants point to the finding of the Court in 1950 that certain of the duties undertaken by the Respondent in the Mandate Agreement are still in force. That proposition, as far as the substantive Trust obligations in the Mandate are concerned, is in effect not in issue in these proceedings. My learned friend Dr. verLoren has indicated to the Court that although we contend that the Mandate, seen as a treaty or convention, has lapsed, we do not offer any argument to the Court on the question, the wider question, whether the Mandate, seen as an objective institution, is still in force, and if so, to what extent. I will deal with that distinction later; I am merely indicating for the moment that we are, without making admissions, assuming for purposes of our argument that the Mandate is still in force as an objective institution; meaning, on the one hand, the title, the rights, the powers of the Mandatory under the Mandate, and, on the other hand, the substantive Trust obligations undertaken by the Mandatory which obliged it to use those powers and rights for the ad-

vancement of and the well-being of the inhabitants of the territory. We are assuming, for purposes of argument, that to that extent the Mandate remains in force, but we are contending that it ceased to be in force as a treaty or convention, as an international agreement. It is therefore common cause between us and the Applicants that, for purposes of the argument, at least the substantive obligations as originally set out in Clauses 2-5 of the Mandate must be regarded as still being in force. Now the Applicants, if I understand their contention correctly, appear to say that that is sufficient to dispose of our first contention. They say that that being so, and because those obligations were originally laid down in an instrument which was a treaty or convention in force, therefore the mere fact that the obligations or duties are still in force must mean that that instrument must still be in force as a treaty or convention. That is how I understand the argument as they propound it in their Observations. They seek to arrive at this conclusion without reference at all to the question of parties between whom the Mandate could be said to be in force as an international agreement, as a treaty or convention. So we could say that the issue which emerges between us and the Applicants in regard to our first contention, the crucial question there, is this: Can it be said that the Mandate can be in force as a treaty or convention when there are no parties between whom it can be said to operate as an international agreement? The Applicants, if I understand them correctly, appear to say the answer is "yes"; we say the answer is "no".

When we come to our second and our third contentions, which relate to the question whether the Applicants can bring themselves within the expression *another Member of the League of Nations* in Article 7 of the Mandate Agreement; when we come to those, the Applicants are unable to avoid the question of parties or the question of States who, in terms of consent on the Respondent's part, may bring the Respondent to Court in the instant cases. It is therefore necessary for the Applicants to attempt to bring themselves within that expression, *another Member of the League of Nations*, for purposes of—within the meaning of—Article 7 of the Mandate Agreement. And they do indeed attempt to do so. They attempt to do so along one or both of two lines of argument, the first one of which they call *Succession* and the second one of which they call *Carry-over*. And if I understand these contentions correctly, they amount to this: that there has been succession on the part of the United Nations, seen as an organization, to the League's supervisory functions regarding the Mandate, and that that succession has led, *inter alia*, to the result that Membership in the United Nations must now be regarded as bringing a State within—I quote from the Applicants—"the descriptive specification of 'another Member of the League of Nations' for purposes of Article 7"; that is how they put it in their Observations at pages 443-446 **(I)**. In other words, briefly stated, their submission appears to be this: that there has been succession which has in effect now made United Nations Membership a qualification for invoking Article 7, in substitution for League Membership. And then their second line of argument, which appears in essence to be an alternative, although they don't put it that way, is that which they call *Carry-over*. They say there has been a carry-over of certain of the responsibilities of the League upon States that were Members of the League at the time of its dissolution, and that has had the result, amongst others, that such States—and I quote their words

again—"remain within the description of another Member of the League for purposes of the Mandate". That line of argument is propounded in the Observations at pages 446-448 **(I)**, and briefly it seems to amount to this: that despite loss of the qualification, League Membership, which was prescribed in Article 7, States that were Members of the League at the time of dissolution have retained the competence to invoke Article 7, and that they have done so by reason of what the Applicants call *a carry-over principle*. So, clearly, the issues in that regard, both in regard to this suggested carry-over principle and in regard to this suggested succession, will have to be very carefully gone into. Indeed, those two issues—those two contentions as advanced by the Applicants—appear to be of crucial importance for the purposes of the First and the Second Objections.

You will have noted, Mr. President, that in our original Objections we deal very fully with a contention to the effect that the Respondent's obligation of report and accountability to the Council of the League in terms of Article 6 of the Mandate Agreement has lapsed, and that it has not been replaced by, or modified into, any obligation of report and accountability to any organ of the United Nations. We deal, as I say, very fully with that proposition. That, of course, is not in itself an objection to jurisdiction—we fully realize that. But on the other hand it does not follow, as the Applicants appear to suggest, that we introduce that subject unnecessarily. The Applicants, strangely enough, almost appear to resent the fact that we deal fully with the matter, because they refer three times in their Observations to the length at which we do so. At pages 428 and 429 **(I)** of their Observations we find that they say, first at page 428 under paragraph 2, "Respondent also devotes over one-half of its First Objection to the question whether Article 6 of the Mandate is in force...". At page 429 **(I)** they say, towards the end of the page, "... such interconnection is not the one on which Respondent bases its lengthy discussion of Article 6". And they continue, two sentences further, "Since Respondent has nevertheless devoted more than thirty-five pages to the question of United Nations supervision...". Their complaint appears to be that stated at page 428 **(I)** where they say that "Respondent fails to indicate, however, what relevance the question of United Nations supervision has to jurisdiction, which is the *sole* issue in these preliminary proceedings". I quite agree jurisdiction is the sole issue. But exactly the way in which the Applicants have developed their contentions in reply to our case, exactly that development has shown the importance for the purposes of these proceedings relative to jurisdiction of this whole question of succession or no succession between the League and the United Nations. The Applicants indeed rely on the alleged succession in the form in which I have indicated as one of their two lines of argument according to which they attempt to bring themselves within the expression *another Member of the League of Nations*. And for that reason, if for that reason alone, this matter becomes of the utmost importance. Our full exposition and examination of that question of succession for purposes of Article 6 dealt very fully with it, and in effect anticipated the Applicants' argument which is now based on that same succession with a view to bringing themselves within the expression *another Member of the League* for purposes of Article 7. They go further, Mr. President, if I understand them correctly. They say that the majority Opinion of the Court in 1950 in regard to Article 7, that that opinion is

to be understood as being based upon the finding that there has been a succession for purposes of Article 6. They say at page 429 (I) of their Observations, "The interconnection, then, between Articles 6 and 7, is this: *according to the majority view of Article 6, Applicants have standing* to invoke Article 7 by virtue of membership in the United Nations...". That is, then, the interpretation which they themselves place upon the majority Opinion of 1950. And now we are in the position, as I have already indicated, of putting before the Court very material, very important information bearing upon that question of succession in regard to Article 6, showing in our submission that, had that been before the Court, its conclusion would have had to be different in that regard. That is why the issue in regard to Article 6 becomes of such crucial importance. It does not follow that if there has been succession in regard to Article 6 there must necessarily also have been succession in regard to Article 7; that still remains a different argument. But if I can satisfy the Court that there has been no succession in regard to Article 6, then that takes away all semblance of a basis for contending that there has been a succession in regard to Article 7. And that is the reason, amongst others, why I shall at an early stage in the development of the argument deal fully with the issues that arise in regard to this suggestion of succession, both in regard to Article 6 and in regard to Article 7.

[Public hearing of 3 October 1962, morning]

Le PRÉSIDENT: L'audience est ouverte. J'ai le regret d'annoncer que M. Alfaro, Vice-Président, ne pourra pas assister aujourd'hui à cette audience pour des raisons de santé. La parole est à M. de Villiers.

Mr. DE VILLIERS: Mr. President, before I deal in detail with the various issues which I outlined yesterday, there is one further matter to which I would like to devote some attention of an introductory nature and that is the question of principles of treaty interpretation. Of course we all know, with respect, that the rules are for the Judges and not the Judges for the rules, and no one would really want it differently. But there are certain fundamental aspects of principles of treaty interpretation which are important. They distinguish between the functions of a Court of Law in expounding and applying the law, and that of other types of tribunals, like a legislature, that may have the function of altering the law in accordance with what it conceives to be politic. There is another reason why I suggest it may be useful to have some brief discussion at the beginning of my argument in connection with these principles of interpretation. I will, of course, not be so presumptuous as to attempt to lecture to the Court on a subject which must be very well known to all of its Members. But for a better appreciation of certain of the aspects of my argument it may be useful to have some emphasis on certain aspects of the principles of treaty interpretation, and to have that right at the start. There is also the factor that we all have different backgrounds as far as legal training and legal practice are concerned and, in order to avoid misunderstanding as to the legal language which I use, it may be useful for me at the start to set out our appreciation, our understanding, of the basic principles as they have been applied in this Court; of course only in so far as may be relevant to the issues in this particular case.

In my brief reference to these principles, I shall deal first with the subject of common intention of the Parties.

As we understand that subject, Mr. President, briefly, the treaties and conventions that operate in international law owe their effect in law to the joint or common consent of the parties thereto. That is the factor that gives to treaties and conventions binding effect in law. Perhaps one ought to add, coupled with the general recognition of the principle that such joint consent gives rise to obligation. And from that premise seems to arise the corollary that all questions concerning either the existence of a treaty obligation, or concerning the measure or the meaning of a treaty obligation, are to be answered basically with reference to the common intent of the parties as it existed at the time when they reached their agreement.

Therefore we find that the basic aim of treaty interpretation, as of interpretation of contracts in municipal law, is generally recognized to be that of giving effect to the common intention of the parties, as well as the Court can, and as that common intention existed at the time when the agreement was reached.

There are, amongst the commentators, certain differences on questions of emphasis as to methods by which one can best arrive at the result of giving effect to the common intent of the parties. Some of these will emerge in the discussion of some of the other principles which I have mentioned. I will not go into discussions which may be academic for our purposes here.

But it seems clear that, except in the case of certain extreme teleologists whose views have never been accepted by this Court, there is general agreement on the proposition that the aim of treaty interpretation is to arrive at that common intent, and that all the rules of interpretation, all the principles, are merely subservient to that dominant purpose—that they are intended to be of assistance for the purpose of arriving at that common intent.

I shall refer, for this fairly obvious proposition, to decisions of this Court, and also to scholarly authority. I do not intend to read fully from these.

Firstly I refer to the Advisory Opinion on the *Reservations to the Convention on Genocide*. There it is stated basically that:

> "It is well established that in its treaty relations a State cannot be bound without its consent... It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses." (Ref. *I.C.J. Reports 1951*, p. 15, at p. 21.)

Then I quote from a minority Judgment in that case which further emphasizes this point as a matter of principle and says particularly that:

> "The fact that in so many of the multilateral conventions of the past hundred years, whether negotiated by groups of States or the League of Nations or the United Nations, the parties have agreed to create new rules of law or to declare existing rules of law, with the result that this activity is often described as 'legislative' or 'quasi-legislative', must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties." (Ref. *ibid.*, at p. 32.)

All this may be very trite, Mr. President, but I emphasize it for a purpose: because that is the theme to which I will return every time

when it comes to the basic, the fundamental issues, concerning the first two Objections. This will be so particularly when we come to deal with broad conceptions—conceptions broadly stated to the Court—such as succession and other matters of a similar kind, where some name is given to a proposition and the name really makes it necessary for one to analyze what lies behind it, and how one brings the contention in line with the fundamental principle that what we are seeking to find and seeking to apply is a matter of common consent, a matter of common intent.

The principle of seeking that common intent in the interpretation of treaties is very well set out—as a principle—by authorities, judicial and scholarly, to which I shall now refer.

Judicial Authority:

Case concerning the Factory at Chorzów, P.C.I.J., Series A, No. 9, 26 July 1927, p. 32.

> "When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it."

"*Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 226*"; per Judge Read at p. 320.

> "There is, however, a principle of international law which is truly universal. It is given equal recognition in Lima and in London, in Bogota and in Belgrade, in Rio and in Rome. It is the principle that, in matters of treaty interpretation, the intention of the parties must prevail."

"*Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15*"; at p. 26.

> "... no State can be bound by a reservation to which it has not consented...".

Page 31, per Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo:

> "The consent of the parties is the basis of treaty obligations..."

"*Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176*"; at pp. 191-192.

> "From either point of view, this contention is inconsistent with the intentions of the parties to the treaties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with France, the Netherlands, Great Britain, Denmark, Spain, United States, Sardinia, Austria, Belgium and Germany over the period from 1631 to 1892. These treaties show that the intention of the most-favoured-nations clauses was to..."

Scholarly Authority:

Ralston, J. H. *The Law and Procedure of International Tribunals*, Revised Edition (Stanford: Stanford University Press, 1926), p. 6.

> "We have said that a treaty was in a general sense an agreement between nations. More specifically, it was described by Plumley, umpire, in the case of the heirs of Jean Maninat, as

'a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute'. "

Page 27:

"As is manifest from all of the foregoing, the intention of the parties must rule, and the principles laid down are after all but means of determining, as scientifically as the subject will permit, what the parties' intentions may have been."

Schwarzenberger, G. *International Law,* Second Edition (London: Stevens and Sons, 1949), Vol. I, p. 208.

"The purpose of the interpretation of an international treaty is to ascertain its meaning, i.e. the intention of the contracting parties. As the Permanent Court of Arbitration had already emphasized in the *Island of Timor case* (1914), 'here again, and always, we must look for the real and harmonious intention of the parties when they bound themselves'."

Lauterpacht, H. "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *The British Year Book of International Law,* Vol. XXVI (1949), pp. 48-85; at p. 83.

"It is the intention of the author of the legal rule in question—whether it be a contract, a treaty, or a statute—which is the starting point and the goal of all interpretation. It is the duty of the judge to resort to all available means—including rules of construction—to discover the intention of the parties; to avoid using rules of interpretation as a ready substitute for active and independent search for intentions; and to refrain from neglecting any possible clues, however troublesome may be their examination and however liable they may be to abuse, which may reveal or render clear the intention of the authors of the rule to be interpreted."

Lauterpacht, H. *The Development of International Law by the International Court* (London: Stevens and Sons, 1958), p. 227.

"... the fundamental principle of interpretation, that is to say, that effect is to be given to the intention of the parties".

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *The British Year Book of International Law,* Vol. XXXIII (1957), pp. 203-93; at p. 204.

"With the exception of those who support the extreme teleological school of thought, no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties."

U.N. Doc. A/CN. 4/101, 14th March, 1956 (*Report on The Law of Treaties*, by G. G. Fitzmaurice, Special Rapporteur), p. 16.

> "Art. 4. (1) The foundation of the treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation."

McNair, A. D. *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 365.

> "In our submission that task (to apply, or construe, or interpret a treaty) can be put in a single sentence: it can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*"

Page 366:

> "The many maxims and phrases which have crystallized out and abound in the textbooks and elsewhere are merely *prima facie* guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case. If they are allowed to become our masters instead of our servants these guides can be very misleading."

I would also like to say, in regard to the views in these quotations as expressed by an honourable Member of this Court, that I know it could be very invidious for members of a court to have cited to them extracts from their writings on a matter which may have become controversial in the particular case. But we are studiously avoiding that. These views which we cite are not controversial in this particular case and are matters of principle set out in, I may say with respect, such a lucid manner that it would have been a pity not to have had them at all in this list; and we include them for that purpose and for that purpose only.

Secondly, Mr. President, we refer briefly to the principles of actuality, natural meaning and contemporaneity. Our understanding of the situation there is briefly this: that one of the normal aims of parties to an international agreement—as to agreements in national law—is to set forth their agreement in writing, in such language as will be clearly understandable to themselves and to others who may have some interest in reading and understanding what that agreement is about. That is one of the normal aims. Naturally, one finds exceptions now and again, where parties intend to disguise what their real intent may have been. Sometimes they don't succeed in their aim, they don't express exactly what their common intent is in fit language for the purpose. But those are the exceptional cases. Normally, therefore, in order to arrive at the intent of the parties, it is a sound rule to look first, as a matter of *prima facie* guide, once to the treaty or contract, as it stands in writing, to the text, and to accept that as being, *prima facie* at least, the agreement between the parties. And secondly, as an equally strong *prima facie* guide, it is advisable to interpret the treaty in accordance with the normal, the natural and the unstrained meaning of the language in the context—this principle sometimes being referred to as the principle of natural meaning. And then, thirdly, virtually as a corollary to the previous two, there is the principle of contemporaneity which is particularly important in treaties, and which

enjoins us to look at current concepts and linguistic usage at the time when the particular treaty was entered into, which may, in the case of treaties, have been a very long time before the need arises for the particular interpretation.

These three principles are well known and are expounded in the authorities which I shall cite. They are, as I have said, not absolute rules but they are very strong *prima facie* guides to intention and are generally accepted as such. Therefore, the authorities go on to stress that there must be special and convincing reasons to displace the results which an application of these principles would indicate in a particular case. So, for instance, if it were intended to show that the text in a particular treaty does not set forth the full agreement between the parties; that there is exceptionally something which has not been expressed in writing but which was nevertheless part of the common intent of the parties, something possibly verbal, something possibly tacit or unexpressed; those are exceptional occurrences and they therefore require special and convincing demonstration. The same applies in a case where the proposition is that the text is exceptionally to be understood as either not giving expression to the common intent of the parties at all, or in some sense other than the ordinary and the natural sense of the words in their context. It is only in these exceptional cases that it then really becomes necessary to have recourse to extraneous means of interpretation. Where, for instance, an attempt is made to show that what is recorded is not really the common intent of the parties, that the recording was in some way at fault, that is one instance in which it might be possible to refer—and a necessary inducement to refer—to extraneous means of interpretation. Otherwise, if there is only one unambiguous, natural, unstrained meaning to be given to a text in a particular context, then that is to prevail. It would then only be in cases of obscurity of language or ambiguity, where a text may be capable—even in its natural connotation—of more than one meaning, that it would be necessary or useful to have recourse to extraneous means of interpretation.

In regard to statements of the principle of actuality and the principle of natural meaning I should like to quote first of all from articles by Sir Gerald Fitzmaurice in the *British Yearbook.*

(Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice: Treaty Interpretation and certain other Treaty Points", *The British Year Book of International Law,* Vol. XXVIII (1951), pp. 1-28; at p. 7.)

> "The thought of the majority could be summed up by saying that in their view the intentions of the framers of a treaty, as they emerged from the discussions or negotiations preceding its conclusion, must be presumed to have been expressed in the treaty itself, and are therefore to be sought primarily in the actual text, and not in any extraneous source. Furthermore, treaties must be interpreted as they stand, and subject to the limitations inherent in the fact that they only contain so many articles, phrases and words. The intentions or presumed intentions of the framers cannot be invoked to fill in gaps, or import into the treaty something which is not there, or to correct or alter words or phrases the meaning of which is apparently plain, or to give them a sense different from that which they possess according to their normal and natural meaning."

Page 9:

"I. *Principle of Actuality.* Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. *Principle of the Natural Meaning.* Particular words and phrases are to be given their normal, natural, and unstrained meaning, in the context in which they occur."

(Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *The British Year Book of International Law*, Vol. XXXIII (1957), pp. 203-93; at p. 209.)

"It is left largely to the textual school to insist that while a treaty should, so far as its terms will allow, be interpreted in such a way as to give effect to its apparent intention, and to achieve what seem to be its objects and purposes, it cannot be stretched to cover more than, on the natural and ordinary meaning of its terms, it does cover, or enlarged to contain what it does not contain; and that if the parties have failed correctly to express their intention in it, or if the apparent object cannot be achieved on the basis of the actual terms of the treaty, the correct, and only correct, remedy is for the parties to amend or supplement it, but that this cannot be the proper function of a tribunal carrying out a purely interpretative task. As the Court has said: 'It is the duty of the Court to interpret ... Treaties, not to revise them'."

Pages 210-11:

Resolution adopted by the Institute of International Law at its Granada Session in 1956:

"*Article 1.*

1. The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of the text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.

2. If, however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced.

Article 2.

1. In the case of a dispute brought before an international tribunal it will be for the tribunal, while bearing in mind the provisions of the first article, to consider whether and to what extent there are grounds for making use of other means of interpretation.

2. Amongst the legitimate means of interpretation are the following:

(a) Recourse to preparatory work;

(b) The practice followed in the actual application of the treaty;

(c) The consideration of the objects of the treaty."

Page 211:

"I. *Principle of Actuality (or Textuality).*

Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. *Principle of the Natural and Ordinary Meaning.*

Subject to Principle VI below, where applicable, particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one, or if such an interpretation would lead to an unreasonable or absurd result. Only if the language employed is fundamentally obscure or ambiguous may recourse be had to extraneous means of interpretation, such as consideration of the surrounding circumstances, or *travaux préparatoires.*"

I would now like to refer the Court to the very well-known passage in the Advisory Opinion concerning the *Competence of the Assembly regarding Admission to the United Nations*—the *Second Admissions Case* as it is sometimes referred to—in 1950.

"The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of the treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and only then, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39):

'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'

When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning." (Ref. *I.C.J. Reports 1950*, p. 4 at p. 8.)

Next, I would like to refer to the point that the Court has emphasized, on certain occasions, that special and good reasons are required for a departure from the natural meaning. The first example of that which I wish to cite is from the *First Admissions Case*, where the Court said: "To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established." (Ref. *I.C.J. Reports 1948*, p. 57 at p. 63.) We find a similar expression in the *Anglo-Iranian Oil Case:*

"... the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.

The text itself conveys the impression that the words 'postérieurs à la ratification de cette déclaration' relate to the expression which immediately precedes them, namely, to 'traités ou conventions acceptés par la Perse', to which they are linked by the word 'et'. This is, in the opinion of the Court, the natural and reasonable way of reading the text. It would require special and clearly established reasons to link the words 'et postérieurs à la ratification de cette déclaration', to the expression 'au sujet de situations ou de faits' which is separated from them by a considerable number of words..."

"*Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 93*"; at p. 104.

The Court proceeded to state that "the Government of the United Kingdom has endeavoured to invoke such special reasons" and, when regard is had to the report, one finds that that attempt, as dealt with in the Judgment, related to extraneous matters which could throw light on the real intent of the parties. Sir Arnold McNair, in his separate judgment in that matter, approached the question of having recourse to extraneous evidence in a slightly different manner. He considered the text to be truly ambiguous, to be equally capable of two meanings, and he said that, on that basis, it was desirable to have recourse to extraneous evidence. He said:

"Both interpretations are grammatically possible, as Counsel for the United Kingdom admitted. Moreover, both are possible as a matter of substance; both make sense, though the effects of the two interpretations are quite different. In short, there is a real ambiguity in the text, and, for that reason, it is both justifiable and necessary to go outside the text and see whether any light is shed by the surrounding circumstances." (*Ibid.*, pp. 117-118.)

Additional authorities to which I wish to refer in this connection are:

Judicial Authority:

Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7, 15th September, 1923, p. 20.

"The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it."

Interpretation of the Convention of 1919 concerning Employment of Women during the Night, P.C.I.J., Series A/B, No. 50, 15th November, 1932, p. 377.

"The mere fact that, at the time when the Convention on Night Work of Women was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms."

"Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950, p. 221"; at p. 227.

"While the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners it is nevertheless true that according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should precede that of the third member."

"Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 266"; at p. 279.

"If regard is had, on the one hand, to the structure of this provision which indicates a successive order, and, on the other hand, to the natural and ordinary meaning of the words 'in turn', this provision can only mean that the..."

Scholarly Authority:

McNair, A. D. *The Law of Treaties* (1961), p. 367.

"In short, it is submitted that while a term may be 'plain' *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used. If that is what is meant by the doctrine of 'plain terms', no objection is raised to it. But if it means that tribunals must stop short of applying the term in its primary and literal sense and permit no inquiry as to anything further, it is submitted that the doctrine is wrong. If the words used are not clear in the light of the circumstances in which they were used, it is permissible for a tribunal to examine the question, whether the intention of the parties is different from that which the words in their natural and ordinary sense express."

The principle of contemporaneity is stated by the scholarly authorities and also in Judgments of the Court. One finds a reference to it in the *Morocco Case*, where the Court said that:

"The Treaty of 1836 replaced an earlier treaty between the United States and Morocco which was concluded in 1787. The two treaties were substantially identical in terms and Articles 20 and 21 are the same in both. Accordingly, in construing the provisions of Article 20—and, in particular, the expression 'shall have any dispute with each other'—it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded. For this purpose it is possible to look at the way in which the word 'dispute' or its French counterpart was used in

the different treaties concluded by Morocco: e.g., with France in 1631 and 1682, with Great Britain in 1721, 1750, 1751, 1760 and 1801. It is clear that in these instances the word was used to cover both civil and criminal disputes. It is also necessary to take into account that, at the times of these two treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco."

"*Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176*"; at p. 189.

Similarly, the principle is stated in *The Minquiers case* by Judge Carneiro where he said:

"I do not regard the Treaty of Paris as a treaty of frontiers. To do so would be to fall into the very error which we have been warned against: an instrument must not be appraised in the light of concepts which are not contemporaneous with it." (Ref. *I.C.J. Reports 1953*, p. 47, at p. 91.)

Then there is the following quotation from an article by Sir Gerald Fitzmaurice in the *British Yearbook* of 1957.

"VI. *Principle of Contemporaneity.*

The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded." (Page 212.)

"... the principle of Contemporaneity, or the interpretation of texts and terms in the light of the meaning they possessed, or the sense in which they were normally used at the time when the treaty was concluded". (Pages 203-204.)

("The Law and Procedure of the I.C.J. 1951-4: Treaty Interpretation and other Treaty Points", *The British Yearbook of International Law*, Vol. XXXIII (1957).)

Mr. President, I come next to a principle which is of very great importance for the purposes of this case, that is the question of implication of tacit agreement—because as I understand the Applicants' case on analysis, with reference particularly to our first and second Objections, it seems to rest in its crucial aspects on suggestions that this Court is to import by implication certain things into the Mandate agreements that were not actually expressed in those agreements, either in the Mandate agreements or in other relevant agreements which enter into the discussion for the purposes of the argument. And, therefore, I wish to place particular emphasis on the question of the principle upon which such an implication may or may not be justified.

I have referred to the principle of actuality, which involves, amongst others, that *prima facie* the contract is to be taken as being fully set out in the written text, though exceptionally it may be possible to

establish that something went without saying, that is something was clear as a matter of actual common intent in the minds of the parties, but they did not express it; something additional, then, to the text, upon which they gave no expression. If one were to enter into a process of ascertaining whether that position does or does not apply in a particular case, then strictly speaking that is not really a matter of interpretation in the narrower sense of assigning a meaning to a text; it is rather a process of attempting to establish a proposition by circumstantial evidence from which eventually a process of inference becomes necessary. The circumstantial evidence would, of course, begin with the indications afforded by the text itself; but then also extraneous matters, surrounding circumstances, *travaux préparatoires*, conduct of the parties subsequent to the treaty, and so forth, may be taken into account as being part and parcel of the whole picture that could be built up by way of circumstantial evidence in order to see eventually whether that logical inference can or cannot be drawn—the inference of a tacit mutual assent which actually existed on the part of the parties in regard to a particular point.

In all legal systems, Mr. President, courts of law have guarded themselves against assenting too readily to a proposition that a certain implication is to be read into a contract, or into a treaty, as the case may be. Because courts have realized that if they were to do that—if they were to assent to propositions of that kind too readily—then they may really become parties to making a new bargain—a new contract—for the contracting parties, which of course is not the courts' true function; the true function being to give effect to the contract actually made by the parties themselves.

Because of the fact that this is a process of reasoning by inference—almost a matter of establishing a proposition by circumstantial evidence—and also because of this danger of making new contracts for parties, the courts have emphasized that in order to be justified such an inference must arise necessarily or inevitably from the evidential data.

That proposition will be found emphasized repeatedly in the following authorities, where the emphasis every time is on the element of *necessary* implication, *necessary* intendment, arising *inevitably*.

Judicial Authority:

"*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174*"; at p. 179.

> "It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.
>
> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."

Page 182:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the

Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

Page 184:

"Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter."

"Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 266"; at p. 275.

"This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum.

These considerations show that the alleged right of unilateral and definitive qualification cannot be regarded as recognized by implication in the Havana Convention."

"Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176"; at p. 198.

"An interpretation, by implication from the provisions of the Act, establishing or confirming consular jurisdiction would involve a transformation of the then existing treaty rights of most of the twelve Powers into new and autonomous rights based upon the Act. It would change treaty rights of the Powers, some of them terminable at short notice, e.g., those of the United States which were terminable by twelve months' notice, into rights enjoyable for an unlimited period by the Powers and incapable of being terminated or modified by Morocco. Neither the preparatory work nor the Preamble gives the least indication of any such intention. The Court finds itself unable to imply so fundamental a change in the character of the then existing treaty rights as would be involved in the acceptance of this contention.

There is, however, another aspect of this problem arising out of the particular Articles to which reference has been made above. These are the Articles which include provisions necessarily involving the exercise of consular jurisdiction. In this case, there is a clear indication of the intention of the parties to the effect that certain matters are to be dealt with by the consular tribunals and to this extent it is possible to interpret the provisions of the Act as establishing or confirming the exercise of consular jurisdiction for these limited purposes. The maintenance of consular jurisdiction in so far as it may be necessary to give effect to these specific provisions can, therefore, be justified as based upon the necessary intendment of the provisions of the Act."

Page 199:

"The Court is not called upon to examine the particular articles of the Act of Algeciras which are involved. It considers it sufficient to state as its opinion that the consular jurisdiction of the United

States continues to exist to the extent that may be necessary to render effective those provisions of the Act of Algeciras which depend on the existence of consular jurisdiction.

This interpretation of the Act, in some instances, leads to results which may not appear to be entirely satisfactory. But that is an unavoidable consequence of the manner in which the Algeciras Conference dealt with the question of consular jurisdiction. The Court can not, by way of interpretation, derive from the Act a general rule as to full consular jurisdiction which it does not contain. On the other hand, the Court can not disregard particular provisions involving a limited resort to consular jurisdiction, which are, in fact, contained in the Act, and which are still in force as far as the relations between the United States and Morocco are concerned."

Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, Tirage spécial, p. 13.

"Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter."

Scholarly Authority:

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice: Treaty Interpretation and certain other Treaty Points", *The British Year Book of International Law*, Vol. XXVIII (1951), pp. 1-28; at p. 9.

"1. Positive and active obligations—as also definite exceptions to, or derogations from, such obligations—cannot be left to arise as a mere inference from a text or provision. They must be expressed in terms. In other words, positive obligations, or exceptions thereto, cannot be *read into* a treaty. If not actually expressed, they must at least be a *necessary* (and not merely a *possible*) inference from what *is* expressed."

Page 22:

"... definite rights and obligations, or specific derogations therefrom, cannot be read into treaty provisions by a process of inference, unless this is a *necessary* and not merely a *possible* consequence of the language used".

Page 23:

"The Court's view is therefore authority for the proposition that in fact violence *is* done to the terms of a treaty (and consequently to major principle II) whenever the existence of a right, obligation, procedure, etc., not expressly provided for in the treaty or prima facie contemplated by it, and not a *necessary* consequence of the terms employed, is nevertheless read into it as not being actually incompatible with those terms, while tending to promote the objects of the treaty."

Page 24:

> "... remedies or sanctions for breaches of a treaty cannot be read into it as mere inference from its terms, still less on the supposition that *a* remedy or sanction of some kind must be presumed to have been intended".

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *The British Year Book of International Law*, Vol. XXXIII (1957), pp. 203-293; at p. 233.

> "In short, the implication, to be validly drawn, must be a necessary one."

McNair, A. D. *The Law of Treaties* (1961), p. 436.

> "Conditions should be implied only with great circumspection; for if they are implied too readily, they would become a serious threat to the sanctity of a treaty. Nevertheless the main object of interpretation of a treaty being to give effect to the intention of the parties in using the language employed by them, it is reasonable to expect that circumstances should arise (as they do in the sphere of private law contracts) in which it is necessary to imply a condition *in order to give effect to this intention.*"

Courts in municipal law systems have frequently dealt with the very same problem, in principle, as to whether a tacit agreement, an implied term, could be read into a contract between parties. Applying this same test of necessary intendment, or necessary inference, the courts have, from a practical point of view, indicated various criteria which may be very useful to bear in mind. I cite them, with respect, to this Court particularly because some of them are so very apt and capable of such very apt application to the problems which arise in this case from the suggestions that an implication of tacit agreement is to be read into certain of these treaties with which we are dealing.

Before doing so I would like to refer the Court back first to the Preliminary Objections at pages 343-344 **(I)** where we cite an extract from a judgment of a Judge of Appeal, and later Chief Justice of South Africa, in which he set out these "two cardinal rules of logic which cannot be ignored" in reasoning by inference. The first is that "The inference sought to be drawn must be consistent with all the proved facts. If not, the inference cannot be drawn." And secondly, "The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

One finds that this same idea is emphasized in the well-known work Wills on *Principles of Circumstantial Evidence* (7th Ed. 1936, p. 19) where the learned author says: "The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the *reductio ad absurdum.*"

The same point was, in effect, made by an Honourable Member of this Court, Mr. Justice Badawi Pasha, in the *Corfu Channel* case (1949), where he stated that "the most reliable doctrine takes the view that 'proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing, unusual and contrary to the way of the world' " (*I.C.J. Reports 1949*, p. 4, at p. 60): thus the same idea, namely that all other reasonable conclusions, or reasonable inferences, must be excluded.

Mr. President, then I also refer to a quotation which will be very well known to the Members of the Court who are acquainted with English jurisprudence. It is the very well-known formulation of Lord Justice Scrutton in the case of Reigate *v.* Union Manufacturing Co., where the matter was put this way by the learned Lord Justice:

> "These principles, however, have been clearly established: The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. [Merely because it would have been reasonable, therefore, the term is not to be inserted.] A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course so and so will happen; we did not trouble to say that; it is too clear'. Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed." (Ref. 1918 1 K.B. 592, at p. 605.)

That gives a very practical demonstration of the type of question one is to ask oneself when considering whether the inference is a necessary one or not.

To this, further comment was added by Lord Justice McKinnon in Broome *v.* Pardess Co-op. Soc. (1940 (1) A.E.R. 603, at p. 612). He stated:

> "I will add only one observation to those passages. Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject-matter, as to which there is an express provision, that there is also an implied provision or condition in the contract."

That is a factor which also comes into the discussion in this case, that when a particular matter is already regulated by express provision in a contract it becomes so much more difficult to suggest that there must in addition be also an implied regulation of that matter in the contract or agreement.

And, finally, I cite from further observations on these very same principles in a South African case by Judge Millin in the Witwatersrand Local Division (Transvaal) in 1943. He was dealing with these very same principles and their practical application. He said:

> "The cases show that the Court has to be continually on its guard against being persuaded to introduce a term which, on analysis

of the argument, appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or to both of the parties and might have been included if the parties had thought of it and if they had both been reasonable. You are not to imply the term merely because if one of the parties or a bystander had suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree. It is quite a different proposition, if in the hypothetical case *Scrutton L. J.* puts in, you feel the parties might say: 'You have called our minds to something we have not thought of and what you say is not unreasonable, let us discuss it.' If that is all that the Court feels might have happened then the Court is not entitled to imply the term.

Again, it follows from the principles which I have tried to extract from the cases that the term sought to be implied must be capable of clear and exact formulation. It must be capable of being formulated substantially in only one way and once there is difficulty in formulating the term, or a doubt as to how it should be formulated or as to how far something or other should be extended which has been thought of, then can it be said that there is a term which the parties must obviously have intended to agree upon? Once there is difficulty and doubt as to what the term should be or how far it should be taken it is obviously difficult to say that the parties clearly intended anything at all to be implied. If you come to the conclusion that if the matter had been raised with the parties at the time they were agreeing and a number of different ways of dealing with the point could have been suggested, it is surely not competent for a party seeking to imply a term to select one of these possibilities and to say that is the term which ought to be implied." (Rapp and Maister *v.* Aronovsky, 1943 W.L.D. 68 at pp. 74-75.)

The next principle to which I wish to pay very brief attention is that which renders of assistance the three factors of *travaux préparatoires, contemporanea expositio* and *subsecuta observatio*. The Court knows the principles in that regard; I do not intend to state what these various concepts mean. The only question that arises is under what circumstances is it either permissible or of assistance to have recourse to these various extraneous means of interpretation. Broadly speaking, again we have to divide the subject into two parts. One is that of interpretation in the narrower sense of assigning a meaning to a text. There, of course, the degree of usefulness of these various extraneous methods of interpretation may increase or decrease in accordance with the clarity or lack of clarity of the text, because if a text in its natural meaning, in its context, is absolutely clear and unambiguous, then it would hardly be possible for any of these external factors to compete against the evidential weight of that text as to what the intention of the parties was. One may get a case then of conflict between these extraneous factors and the clear indications afforded by the text. And so, of course, one can get various gradations; the text may not be absolutely clear or, on the other end of the scale, it may be completely ambiguous or obscure, and depending on matters of degree it may be possible then, for purposes of textual interpretation, to have recourse to these matters

—these aids to interpretation—and to find them useful. But there is also the other aspect of what is possibly not strictly interpretation but is generally regarded as a process of interpretation—*quasi* interpretation—and that is to decide whether in a particular instance the parties were tacitly agreed upon something which they did not express. And in the course of an inquiry of that nature, these factors appear to have been freely admitted and taken into account by this Court, with respect quite correctly, because they form a necessary part of the evidential data from which inferences eventually are to be drawn. Therefore, it will be found that some of the authorities to which I will refer deal with these aids to interpretation in the one respect I have mentioned, while others deal with them in the other respect I have mentioned. With regard to *travaux préparatoires*. I refer to the *First Admissions* case where the suggestion was that there should be use of *travaux préparatoires* for purposes of assigning a meaning to the text. The Court said:

> "The Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself." (Ref. *I.C.J. Reports 1948*, p. 57, at p. 63.)

We find much the same stated in the *Second Admissions* case, and in the *Ambatielos* case on jurisdiction.

> "When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*."

"Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950, p. 4"; at p. 8.

> "In any case where, as here, the text to be interpreted is clear, there is no occasion to resort to preparatory work."

"Ambatielos case (jurisdiction), Judgment of July 1st, 1952: I.C.J. Reports 1952, p. 28"; at p. 45.

The same point again that where the text to be interpreted is clear, there is no occasion to resort to preparatory work. These are instances then of suggested use of *travaux préparatoires* for purposes of textual interpretation.

We find for the same purpose a passage in Lord McNair's *Law of Treaties* where he stated:

"Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, when there is a doubt as to the meaning of a provision, or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law." (McNair A. D., *The Law of Treaties* (1961), p. 424.)

I must apologize. I see I went over to the other aspect not confined to *travaux préparatoires* but to the matter of subsequent conduct between the parties, where, in principle, the position is very much the same. Then in regard to *travaux préparatoires*, as regards the other aspect of using it (or using subsequent conduct) as a factor of circumstantial evidence in an inquiry as to tacit intent, one finds that that has been done on various occasions. So, for instance, in the *Genocide Advisory Opinion* the Court said:

"The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary-General."

"Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15"; at p. 22.

I may in this regard refer to the very apt comment of Sir Gerald Fitzmaurice in his 1951 article in the *British Yearbook*, where, speaking of the situation as at that date, the learned author stated:

"The Court has shown no eagerness to have recourse to *travaux préparatoires* and has not in fact done so, except on one occasion where the issue was not strictly one of interpretation."

A footnote to the above is to the following effect:

"In its Advisory Opinion on the Reservations to the Genocide Convention (*I.C.J. Reports 1951*, p. 15), the Court based its view in part on certain statements made by representatives of Governments during the drafting of the Convention. But in so doing, the Court was not interpreting any provision of the Convention itself (nor did the Request addressed to it put any point of interpretation as such). The particular issue involved in the appeal to the records was whether, despite the absence of any express clause in the Convention permitting reservations to be made, there had been a tacit understanding among the delegates drawing up the Convention that certain kinds of unilateral reservations would be permitted. The point was therefore extraneous to the text of the Convention, and the question of intention was a *substantive* issue, *per se*, rather

than something to be ascertained as a *means* to interpreting something else." (Fitzmaurice G. G. "The Law of Procedure of the I.C.J.: Treaty Interpretation and other Treaty Points", *British Yearbook of International Law*, XXVIII, 1951, pp. 1-28 at p. 6.)

There is a later case, that concerning the *Rights of Nationals of the United States in Morocco*, where there was again a recourse to preparatory work for the purpose of seeing whether a certain implication could be made, and in which the Court said:

"Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176"; at p. 198.

"An interpretation, by implication from the provisions of the Act, establishing or confirming consular jurisdiction would involve a transformation of the then existing treaty rights... Neither the preparatory work nor the Preamble gives the least indication of any such intention."

Page 209:

"It cannot be said that the provisions of Article 95 alone, or of Chapter V of the Act considered as a whole, afford decisive evidence in support of either of the interpretations contended for by the parties respectively...

The Court has examined the earlier practice, and the preparatory work of the Conference of Algeciras of 1906..."

We find the same thing with regard to the principles of subsequent conduct on the part of the parties. These principles of subsequent conduct can also be applied in one or the other sense; either of assigning a meaning to a text where that text is for some reason obscure or ambiguous and where the other methods of interpretation do not provide a clear answer, or alternatively with much freer use, under circumstances where the issue is not one of strict interpretation of a text but one of ascertaining whether there was a tacit agreement or understanding upon a particular point.

I refer to:

Judicial Authority:

Jurisdiction of the Courts of Danzig (Pecuniary claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration), P.C.I.J., Series B, No. 15, 3rd March, 1928, p. 18.

"The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive. This principle of interpretation should be applied by the Court in the present case."

"Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4"; at p. 25.

"The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation."

"Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950, p. 4"; at p. 9.

"The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only 'if the Security Council recommends the applicant State for membership' (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 296 (IV), the very one that embodies this Request for an Opinion."

Scholarly Authority:

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice: Treaty Interpretation and certain other Treaty Points", *The British Year Book of International Law*, Vol. XXVIII (1951), pp. 1-28; at p. 9.

"V. *Principle of Subsequent Practice.* In interpreting a text, recourse to the subsequent practice of the parties, as evidenced in rules of procedure they have formulated, or in other ways, is not only permissible but desirable; in brief, the way in which the treaty has actually been interpreted in practice is evidence (sometimes the best evidence) of what its correct interpretation is."

Pages 20-21:

"It is a fair inference from the attitude of the Court that, in its view, the subsequent practice of the parties in relation to a treaty is not only a legitimate guide to its correct interpretation, but probably a more reliable guide than recourse to *travaux préparatoires* or the attempt to ascertain the presumed intentions of the original framers. It should be observed, however, that strictly speaking, although it is convenient to classify the matter as a principle of interpretation, it is not really that so much as a rule of evidence. It is a question of the probative value of the practice of the parties as indicative of what the treaty means."

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *The British Year Book of International Law*, Vol. XXXIII (1957), pp. 203-293; at pp. 211-212.

"V. *Principle of Subsequent Practice.* In interpreting a text, recourse to the subsequent conduct and practice of the parties in

relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is."

Footnote to this Principle:

"Where the practice has brought about a change or development in the meaning of the treaty through a *revision* of its terms by conduct, it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms."

Page 223:

"It is, of course, axiomatic that the conduct in question must have been that of both or all—or, in the case of general multilateral conventions, of the great majority of the parties, and not merely of one ...
... a *consistent* practice must come very near to being conclusive as to how the treaty should be interpreted."

McNair, A. D. *The Law of Treaties* (1961), p. 424.

"Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, when there is a doubt as to the meaning of a provision, or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law."

Apart from questions of textual meaning, the subsequent conduct of parties, particularly at stages where one would expect them to recall a tacit agreement to mind and to apply it—under those circumstances the subsequent conduct of the parties could, in our submission, afford a very cogent guide, a very strong probative factor, on the question whether an inference as to tacit intent arises necessarily.

Finally, Mr. President, and perhaps with a sense of relief on the part of the Court, I come to the last of these principles—the one of effectiveness *(ut res magis valeat quam pereat)*. This is the principle by which, as we understand it, the Court has taken account of objects and purposes of treaties to be interpreted, and where the Court, in case of doubt, interprets a treaty in such a way as to give major effect to those objects and purposes. It is a principle which is again invoked in the present case in crucial respects by the Applicants, that is why I want to give some close consideration to it at the present stage.

Again, the primary form of application of the principle is one in what I have termed the narrower sphere of interpretation, of assigning a meaning to a text. Indeed, the maxim is put by some authorities in this form: *Verba ita sunt intelligenda ut res magis valeat quam pereat*—"words are to be so understood...". And, in the various continental codes, one finds the principle stated in the same form. For instance in the French code—I will give a free English translation—in Article XI 57: "When a clause is susceptible of two meanings it is to be understood rather in that sense in which it can have some effect than in the sense

in which it can have no effect at all." The Dutch code, Article XIII, 80, is exactly the same, and the Italian code, Article XIII, 67, is much the same, except that instead of referring to "When a clause is susceptible of two meanings" it simply says "In a case of doubt".

That is the primary sphere of application of the principle. In a case of doubt, in a case of ambiguity, in a matter of textual interpretation, that provides a sphere for application of this principle—a very legitimate one. But here too, as in the case of certain of the other principles which we have discussed, it has been introduced into the other sphere, which is, as I have said, not strictly one of interpretation but one of implication, or suggested implication, of tacit intent in a particular instance.

It could, in that respect, be a factor, but no more than a factor, to be taken into account together with all the other evidential data, in the process of determining whether or not a necessary inference as to tacit intent on a particular point can be drawn.

In the authorities which I shall cite, we find then that the principle is stated in relation to its application in both of these spheres. We find, for instance, the general statement in the Judgment of the Permanent Court, in the case of the *Acquisition of Polish Nationality:*

> "... an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible". (P.C.I.J., Series B, No. 7, 15 Sept. 1923, p. 17.)

And in the *Corfu Channel* case Judgment, it was stated:

> "In case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects." (*I.C.J. Reports 1949*, p. 4, at p. 24.)

That still appears to apply primarily to textual interpretation. And we find the principle, very aptly if I may say so, stated in an article by Sir Gerald Fitzmaurice in the 1957 *British Year Book of International Law:*

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice: Treaty Interpretation and certain other Treaty Points", *The British Year Book of International Law*, Vol. XXVIII (1951), pp. 1-28; at p. 9.

> "*Subject to I and II:*
>
> III. *Principle of Integration.*
> Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles.
>
> IV. *Principle of Effectiveness.*
> Particular provisions are to be interpreted so as to give them the fullest weight and effect consistent with the normal meaning of the words and with other parts of the text."

Page 18:

> "These principles are subordinated to the first two, because otherwise they would be liable to lead to a purely teleological method of interpretation which the Court declined to follow. Subject to this, they were endorsed by the Court."

With regard to the other sense, which for our purposes in the present case is the more important one, I quote from *Halsbury's Laws of England*—Volume 11, page 392 of the 3rd Edition—where the learned authors state, with reference to English case law:

> "In order to give effect to a contract according to what appears to have been the intention of the parties, the Court may imply a term or condition or a qualification of a clause which is not inconsistent with the general tenor of the document, but where the intention of the parties is not sufficiently clear the Court will not make a contract for them in order to prevent the whole agreement from being void on the ground of uncertainty or otherwise."

And, again, with reference to that type of application of the principle, we find an illustration in the *Reparation for injuries* case, 1949.

"*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174*"; at p. 179.

> "It is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged."

Page 183:

> "Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world... Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection."

There the Court dealt with the question of what powers the United Nations Organization must be regarded as having by virtue of its Charter with a view to what it called protection of its agents against certain types of injuries in the course of their duties. The conclusions at which the Court arrived, as is apparent from these passages and also the earlier ones cited by me, were based on necessary implication or necessary intendment from the terms of the Charter, and in the reasoning which led to the conclusion this factor of effectiveness played a very large part. It is, then, a factor which could, in the determination of a probability as to what the intent of the parties was likely to have been, play a part.

But I wish to stress, with respect, that in a process of that kind, where the inquiry is as to tacit intent, one cannot concentrate on one element of presumed effectiveness to the exclusion of all other cogent indications of what the real intent of the parties was. One must inevitably have regard to all relevant, practical, reliable indications of intent before coming to one's final conclusion. And that is a warning which has very often been stated in the jurisprudence of this Court and also by commentators in international law and, indeed, also in the sphere of national law—a warning that, at most, this rule is intended to assist the Court

in the process of arriving at the intentions of the parties and it cannot override or supplant the real intention of the parties or the absence of intent upon a particular point. That warning one will find repeated in various decisions of this Court, for instance in the *Peace Treaties* case (Second Phase).

There the Court stated:

"The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit..."

The rest of the passage goes on in a similar vein:

"The ineffectiveness in the present case of the clauses dealing with the settlement of disputes does not permit such a generalization" [as was suggested to the Court].

"... Normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligation. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision." (*I.C.J. Reports 1950*, p. 221, at pp. 229-230.)

Similar caution is either expressed or is demonstrated in the *Morocco* case, where the Court said:

"The purposes and objects of this Convention were stated in its Preamble in the following words... In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention. The Court, in its Opinion—Interpretation of Peace Treaties (Second Phase) (*I.C.J. Reports 1950*, p. 229)—stated: 'It is the duty of the Court to interpret the Treaties, not to revise them'."

"*Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176*"; at p. 196.

And in the *Anglo-Iranian Oil case* Judge Read forcibly stated the warning in regard to the application of this principle:

"It is my duty to interpret the Declaration and not to revise it. In other words, I cannot, in seeking to find the meaning of these words, disregard the words that as actually used, give to them a meaning different from their ordinary and natural meaning, or add words or ideas which were not used in the making of the Declaration."

"*Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 93*"; at p. 145.

I would again, because of their pertinence to certain of the issues in this case, like to refer the Court to scholarly authority where this caution is very effectively expressed. I would like to read first from an article by Sir Gerald Fitzmaurice. It is at pages 211 and 222-23 in the article in the *British Year Book of 1957*:

> "IV. *Principle of Effectiveness (ut res magis valeat quam pereat).* Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text."

Pages 222-223:

> "... it is through the principle of effectiveness that the Court has given its legitimate place to the teleological element in interpretation (objects and purposes). But, as shown on pp. 19-20 of the 1951 article, precisely because of its teleological tendencies, and the danger of falling into judicial legislation that the teleological principle may involve, the Court has subordinated the principle of effectiveness to that of the textual and natural meaning, in the sense that it is never legitimate, even with the object of giving maximum effect to a text, to interpret it in a manner actually contrary to, or not consistent with, its plain meaning."

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *The British Year Book of International Law,* Vol. XXXIII (1957), pp. 203-93; at p. 211.

I may add, with respect, that the principle of effectiveness would not enable the Court to make implications, where that is suggested in conflict with the ordinary principles which apply to the process of making such an implication.

The same type of caution is expressed by the late Judge Lauterpacht in an article, and in his book *The Development of International Law.* I cite a number of quotations all to the same effect that the application of the principle of effectiveness is not to override intent but it is to be used as a method of arriving at the joint intent.

Lauterpacht, H. "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *The British Year Book of International Law,* Vol. XXVI (1949), pp. 48-85; at p. 73.

> "The intention of the parties—express or implied—is the law. Any considerations—of effectiveness or otherwise—which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation."

Page 74:

> "No rule or principle of interpretation is acceptable unless it proceeds from or acts upon that paramount consideration. In particular no principle of effectiveness can properly endeavour to give

legal efficacy to clauses or instruments which were not intended to produce such results."

Page 83:

"... the principle of effectiveness constitutes a general principle of law and a cogent requirement of good faith. It finds abundant support in the practice of international tribunals. On the other hand, the principle ... is in the last resort no more than an indication of intention, to be interpreted in good faith, of the parties."

Lauterpacht, H. *The Development of International Law by the International Court* (1958), p. 227.

"... effectiveness ... may be put in jeopardy by the deliberate inconclusiveness of a treaty embodying a compromise attempted but not actually achieved".

Page 228:

"... deliberately or otherwise, there may have been no intention to render the treaty fully effective".

Page 229:

"For the principle *ut res magis valeat quam pereat* does not mean that the maximum of effectiveness must be given to an instrument purporting to create an international obligation; it means that the maximum of effectiveness should be given to it consistently with the intention—the common intention—of the parties.

Moreover, the principle of effectiveness provides no ready-made solution in cases in which a decision must be reached in relation to apparently conflicting provisions of the same treaty as, for instance, in the matter of the principal provision and the exceptions thereto."

Page 230:

"A choice must thus be made between the effectiveness of the general purpose and the exceptions thereto."

Page 281:

"... absence of agreement could not properly be supplemented by an inference aiming at securing for the instrument in question a higher degree of effectiveness than was warranted by the intentions of the parties".

Finally, because of their aptness to the present case, I would like to give your Lordships three quotations, very briefly, from authorities in municipal law on this very same point. The first is from *Halsbury's Laws of England*, 3rd Edition, the 8th volume at pages 121-122:

"Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have."

Further, at page 122:

"If the contract is effective without the suggested term and is capable of being fulfilled as it stands, generally speaking an implication ought not to be made."

Then at page 123:

> "Where, though there has been no frustrating event putting an end to the contract, a turn of events has occurred which was not contemplated by the parties to the contract, the court is not thereby entitled to qualify the contract for the purpose of doing what seems to it just and reasonable."

I also have a quotation from the well-known work of the American author, Williston, *On Contracts*:

> "620: Secondary rules: The writing will be interpreted if possible so that it shall be effective and reasonable.
>
> An interpretation which makes the contract or agreement lawful will be preferred over one which would make it unlawful; an interpretation which renders the contract or agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless; an interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results..."

And then a qualification at the end:

> "But the mere fact that parties have made an improvident bargain will not lead a court to make unnatural implications or artificial interpretations. A court will not under the guise of interpretation write a new contract for the parties." Williston, *On Contracts* (Rev. ed.), Vol. 3, Sec. 620.

I wish to conclude on that note with reference to Lord McNair's work, *The Law of Treaties*:

> "The rule of effectiveness must mean something more than the duty of a tribunal to give *effect* to a treaty; that is the obvious and constant duty of a tribunal, that is what it is there to do. The rule must surely mean, in the mind of the party involving it: 'If you (the tribunal) do not construe the treaty in the way that I submit to you to be correct, this treaty will fail in its object.' But that is a *petitio principi*, because as has been submitted in the previous chapter, it is the duty of a tribunal to ascertain and give effect to *the intention of the parties as expressed in the words used by them in the light of the surrounding circumstances*. Many treaties fail—and rightly fail—in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty." (McNair, A. D. *The Law of Treaties* (1961), p. 383.)

Mr. President, I have emphasized these warnings, these cautionary notes, perhaps to excess, but I have done so with a purpose, because we find that in the crucial aspects of the issues before the Court—in questions which are essentially questions of interpretation—we find contentions advanced by the Applicants using expressions somewhat grandiose, somewhat sweeping, such as "the four sides of a quadrilateral jural system", such as "an organized international community" with "organs" that "replace" one another by virtue of a "doctrine of succession" "explicit" in some cases and "implicit" in other cases. Those

are expressions which are used in questions of treaty interpretation. We find recourse to a so-called "*de facto* carry-over of the responsibilities of an entity which has formally been dissolved", and that "carry-over principle" is distilled from statutory provisions in certain municipal legal systems!

I am reminded that an eminent Australian judge once said that the greatest of fallacies may be wrapped up in a felicitous phrase, or words to that effect. And it will be my task, part of my task, Mr. President, to analyze these phrases and these expressions in order to see what is really wrapped up in them from the point of view of treaty interpretation, from the point of view of ascertaining the intentions of the parties. In particular, I shall have to analyze whether in effect the Court is not being invited by these contentions to revise the treaties instead of interpreting them. I may be at fault, but it seems to me very difficult to understand why it should be necessary to use all these high-sounding doctrines and theories and bring them into the picture of a simple question of treaty interpretation; of saying, in other words, what the words of the treaty mean and what the treaties imply as a matter of tacit intent which was so clear that the parties did not trouble to express it, as a matter that went without saying.

But perhaps I am precursing my argument. I have come to the end of this section on principles of interpretation.

[Oral hearing of 3 October 1962, afternoon]

Mr. President, in outlining the issues in regard to the First and Second Objections yesterday, I indicated that they concerned the effect of the dissolution of the League upon certain pre-existing relationships in regard to the Mandate. I propose to deal specifically now with certain of those issues but, as a basis for doing so, it is necessary to go back in order to find what those pre-existing relationships were in the lifetime of the League of Nations, because that is where the issues between the Parties commence. In order to ascertain what the effect was of dissolution of the League on what went before, one must have absolute clarity first as regards the position that went before. Now, fortunately, not everything in that regard is contentious or in issue between the Parties. There are certain aspects of those pre-existing relationships that may be said to be common cause, or at any rate they do not appear to be contested in the written Pleadings which are before the Court. I could indicate certain of those features very briefly and broadly without the elaboration with which they have already been dealt with in our Preliminary Objections. We deal in our Preliminary Objections, at pages 300-307 (I) with what we term the contractual origin and effect of the Mandate. In essence, we point out there that the Mandate System was brought into existence by a process of international agreement. It came about—this constitution of the Mandate System—in virtually two stages. The first stage was the international compromise agreement, which became Article 22 of the Covenant of the League. That Article provided for a Mandate System to be constituted. It provided for the agreed idealistic objectives of such a system; it provided for agreed methods whereby the system would be put into operation; and it provided for agreed features that would be incorporated in such a system—substantively, corresponding to the sacred trust and, procedurally, to the securities for the performance of that trust. But Article 22 did

not itself purport to put the Mandate System into operation. For that, such further steps as contemplated in Article 22 itself were necessary. Article 22 was an agreement internationally between the Members of the League, as such, regarding a Mandate System to be constituted in terms thereof; but the system would only come into operation upon specific agreements by specific mandatories to undertake a Mandate in accordance with Article 22, with reference to a particular mandated territory. It would only be upon that act of specific consent to an international agreement that the Mandatories would acquire the rights under the Mandate System, and incur for themselves the international obligations envisaged therein.

That is then what happened in what one might term the second phase of the constitution of the Mandate System. That, in itself, really partook of two portions. One was the allocation of the Mandates to particular Mandatory Powers by the Principal Allied and Associated Powers, and the tentative agreement between those Powers and the specific Mandatories about terms and provisions to go into the particular Mandate Agreement. And the other part of it was the agreement as between each Mandatory and the Council of the League, in regard to the particular Mandate to be issued to the particular Mandatory.

All that took place, Mr. President, in pursuance of international agreement, because the Principal Allied Powers acted in pursuance of Articles 118 and 119 of the Treaty of Versailles, by which the power of disposal over those German possessions had been granted to them. The Council of the League, in turn, in coming to agreement with the Mandatories, acted in pursuance of paragraph 8 of Article 22 of the Covenant which specifically authorized the Council to do that, the Covenant itself and the Treaty of Versailles itself both being international treaties or conventions. So that the origin—the basis—of the whole Mandate System was international agreement. The contractual consequences of the Mandate were, for the Mandatory, the powers and the rights obtained and the obligations accepted through the voluntary agreement of each Mandatory to each Mandate instrument, to the terms set forth therein. The powers and the rights and the obligations could be described as international in the sense that they were valid against other international persons as powers and rights; they were owed to other international persons as obligations. And they were contractual because they were in force by reason of an operative agreement, the Mandate being an agreement between the Council of the League representing the League of Nations and, possibly, also its Members, and the Mandatory on the other hand.

Therefore, Mr. President (I am putting the matter very briefly—it is dealt with more fully in the Preliminary Objections), if, at any stage during the existence of the League, the question had arisen whether the Mandate could be regarded as a treaty or convention in force, then the answer would obviously have been "yes—it is in force as an international agreement between its parties"—those parties being, as indicated before, the Mandatory on the one hand, and the League, and/or its Members on the other hand. The question of parties will be dealt with further (I will deal with it later) in order to emphasize the importance of membership of the League in regard to the question of being a party to the Mandate Agreement. But, for the moment, I merely want to point out that it does not appear to be disputed, in the written Pleadings

before the Court, that the circle of parties did not extend wider than the Mandatory, on the one hand, and the League and/or its Members, on the other hand. We deal, in the Preliminary Objections (at pp. 307-308 **(I)** para. 14, of our Chapter III) with the situation in regard to the Principal Allied and Associated Powers. Our submission is briefly that to role which they played in the constitution of the Mandatory System was a transitory one. They had the power of disposal of the colonies and possessions—they, as it were, brought them into the Mandate System—but, thereafter, in the agreements which were actually forged (in Article 22 and in the actual Mandate Agreements—the Mandate instruments) no specific role was provided for on the part of the Principal Powers as such. They would not be parties between whom and the Mandatory a contract or international agreement would operate. They, as it were, brought the possessions into the Mandate System and then they retired further from the operation of that system. They would, of course, take part in the operation of the system, either as individual Mandatory Powers in some cases, or as Members of the League and Members of the Council, in other instances, but not as Principal Powers, as such.

We deal also, Mr. President, at pages 358-359 **(I)** (that is paragraph 51 of Chapter III of the Preliminary Objections) with the position regarding the inhabitants of the territory and we point out, for the reasons there dealt with, that they could not possibly have been regarded as being parties to an international agreement—the Mandate Agreement. The circle, therefore, was confined to the Mandatory and the League and/or its Members, and that proposition, and indeed the fact that the Mandate operated in the lifetime of the League as an international agreement—as a treaty or convention—does not appear to be contested by the Applicants. I will proceed then on the basis that they are not contested. If they should be, in the course of these proceedings, I will deal with them further, but I use them as a basis for the further argument of the issues between the parties in regard to the First and Second Objections.

Mr. President, in submitting that the Mandate had this contractual effect to which I have referred, we must not be understood as suggesting that its effect was contractual only. We are fully aware of the distinction drawn in the 1950 Advisory Opinions—particularly elaborated in the separate Opinion of Sir Arnold McNair—between the operation of the Mandate as a treaty or convention and its operation as an objective real institution which could exist independently of operation of an international agreement. That distinction appears also to have formed the basis of the reasoning in the majority Opinion, although it was not quite so fully elaborated as in the Opinion of Sir Arnold McNair.

I have already indicated that for purposes of argument we assume in these proceedings that that distinction is a sound one and that the Mandate did have this additional operation—this operation of being a real, or objective, institution, in addition to having a contractual operation. But the point—the only point I wish to make at the moment—is that, as appears from the Opinions in 1950 themselves, that contemplated objective or real operation was seen as being something additional to the contractual, and not as something that displaced the contractual operation.

As I shall have to deal with that distinction in more detail later, and for that purpose I will then refer to the wording of the 1950 Opinions

in that respect, I shall not do so at this stage, in order to avoid repetition on that point.

I proceed to deal with one of the first, and one of the most important, issues relating to the First and Second Objections. That is the effect of the dissolution of the League upon the Mandatory's obligations relative to supervision on the part of the League organs, generally referred to as the supervisory functions of the League. And our broad contention is, as I have indicated before, that in this respect the obligation on the part of the Mandatory was terminated completely on the dissolution of the League and the obligation was not converted into a similar obligation of report and accountability to any organ of the United Nations. This is a matter that was dealt with in the 1950 proceedings and the Court decided on the question, with a majority of 12 to 2, in favour of a ruling that there was now an obligation on the Mandatory to report and account to the General Assembly of the United Nations. It is particularly in that respect that we submit that there is information of very vital importance which is now put before the Court, which was not before the Court in 1950, and which particularly renders desirable a full reconsideration of this whole question.

We elaborate our argument in this regard fully in the Preliminary Objections. But in order to deal with the issues that have now arisen between us and the Applicants in that regard, I will, as a basis of my argument, have to restate certain of those elements which have been dealt with in the Preliminary Objections very briefly and without full elaboration. I will state them merely as a basis for bringing me to the crucial issues between the two Parties.

In the Preliminary Objections we point out that this element of report and accountability to the Council of the League as a supervisory authority was something which brought about a measure of resemblance between the international mandate institution and the municipal law institute of a *mandatum*; it is an element of resemblance, of broad resemblance. One does not say that those two institutions could be assimilated to one another, because the international Mandate institution also had other elements, other elements which brought about broad resemblance with the trust institution and with the tutelage institution of municipal law.

We point out further that this element was an innovation in the history of the government of backward communities which was considered to be of very great practical importance, as compared with previous avowals of a sacred trust in colonial administration and even earlier international arrangements or agreements which had recognized substantive obligations of sacred trust and tutelage in that regard. It was considered to be an important element. How important, and of what determinative value in the mandate as a legal concept, is a different matter with which I will deal later.

We point out further that although it is customary to speak in this regard of "supervisory functions of the League", of "League supervision" and so forth, those are not expressions that were used in the actual Mandate instruments or in the Covenant itself. They are descriptions which really follow from the obligation undertaken by the Mandatory to report to the Council of the League. The only specific provisions in the Mandate treaties—including in that description the Covenant of the League—relevant to this obligation are to be found in paragraph 7 of

Article 22 providing for a report to the Council of the League; paragraph 9 of Article 22 providing for the Permanent Mandates Commission, and then in Article 6 of the Mandate Agreement itself. In all cases the matter is put on the basis of an obligation on the part of the Mandatory to report to the Council. The element of account of which we speak really emanates from the wording of Article 6 in that respect where it says that this report shall be:

> "to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5".

In other words, the essence of this reporting was to indicate to the international supervisory authority what the Mandatory was actually doing with a view to fulfilment of the substantive obligations undertaken in the earlier portion of the Mandate Agreement. It was in that sense then that the Mandatory was said to be under an obligation not only to report but also to account to the supervisory authority, the Council of the League. And the description of the Council as a supervisory authority really only follows from the Mandatory's agreement, the Mandatory's consent, to accept this obligation to report and account.

And so, for instance, Mr. President, we refer to a similar type of substantive obligation undertaken by all League Members in Article 23 *(b)* of the Covenant, where they stated that:

> "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League undertake to secure just treatment of the native inhabitants of territories under their control."

That could historically be said to be the forerunner of Chapter XI of the Charter of the United Nations.

Now, there was a substantive obligation undertaken similar to the substantive obligations in the various Mandate agreements; but in the absence of a complementary agreement—rather supplementary agreement—providing for report to a supervisory authority, there has never been any suggestion that that was an obligation to be undertaken under the supervision of the League. There has never been any suggestion that the League had any supervisory functions in regard to an obligation of that kind.

Therefore the essence of looking at the League as a supervisory authority is really the Mandatory's voluntary undertaking of the obligation of report and accountability.

Again, and it is necessary to get this clear at the outset, the procedure in regard to petitions being sent to this supervisory authority appears to have been entirely subsidiary and dependent upon the fact that the Council was the supervisory authority. Petitions were sent in fact, and the Council then had to evolve some form of procedure as to how petitions would be dealt with. From that emanated the rules which provided for petitions to be forwarded through the Mandatory so as to give the Mandatory an opportunity of commenting on the petitions. But the petitions went to the Council because the Council was the supervisory authority, and the Council was the supervisory authority because of the obligation to report and account *as undertaken by the Mandatory*. So everything in this regard also revolves around that fundamental obligation *as undertaken by the Mandatory*.

The source and the origin of this obligation to report and account was contractual in the sense which I have indicated; the Mandatory becoming bound to it by its agreement to Article 6 of the Mandate. If one further bears in mind the suggested distinction by analogy which Sir Arnold McNair employed in 1950 as between personal rights and obligations on the one hand, and real rights and obligations on the other, I would submit with respect that by its very nature this obligation would have to be classified as a personal one. One can understand that obligations to deal with property, to deal with a territory, to deal with powers of administration of a territory, for a trust purpose—that substantive obligations of that kind could be regarded as obligations which affect the property itself; which affect territory, by analogy, itself, and which could be said to be something of the nature of an *onus reale* resting upon the power or the title to that property or to that territory. But when it comes to an obligation of a procedural kind, an obligation to report to an outside body, to a third party not involved in the trust itself, to a supervisory body, in regard to the manner of discharge of substantive trust obligations, then that surely by its nature would be personal. It could hardly be said to be something affecting the property itself, or the title to the property. But that is not a matter of particular importance. However one views the matter in that regard, the important question is, does one regard this obligation of report and accountability as being an element of the Mandate which was severable from the other aspects of the Mandate, or must it be regarded as being an integral portion of such a kind as to be totally inseverable from other aspects of the Mandate institution. A question of severability or inseverability is of course, in the case of something which grows out of agreement, always to be related back to the common intent of the parties which brought that institution into existence by their agreement.

The consequences of regarding this obligation to report and account as being an absolutely necessary inseverable element of the Mandate institution, as it was conceived by its founders, would be that if one should come to the conclusion that this particular obligation ceased to exist, that it could no longer be capable of performance, then the whole Mandate institution would have to fall to the ground and would have to be regarded as having lapsed, because of the premise of inseverability between this element and the rest of the Mandate institution. That, however, was not the view of the situation which is apparent from the Opinion in 1950. Indeed, if we take first the separate, or shall we say in this regard, the minority Opinions of Sir Arnold McNair and Judge Read—because the position in that respect can be demonstrated most easily in the case of these opinions—they actually found that the obligation to report and account had lapsed, but that the Mandate as an institution in other respects still remained in existence. Judge Read, indeed, emphasized specifically this element of severability which existed in his view. I think that is to be found at page 165 of the 1950 Opinions where he said:

> "This third class of obligations [i.e. those under Articles 6 and 7 of the Mandate] 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. [They are the substantive obligations.] 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."

So here is a very explicit statement of the view of severability, and indeed, as I pointed out, the very conclusion arrived at in this opinion, as in the Opinion of Sir Arnold McNair, followed upon that basis.

But, Mr. President, the same view emerges on analysis from the majority Opinion of the Court. The majority Opinion dealt first with the question whether the Mandate seen as a *status*—seen as title on a Mandatory's part on the one hand and substantive obligations, as set forth in Articles 2 to 5, on the other hand—was still in existence. In dealing with the obligations, the Court dealt first with the substantive obligations as set forth in Articles 2 to 5; and at page 133 of the *Opinion*, these obligations are referred to as follows:

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

I emphasize that their fulfilment did not depend upon the existence of the League of Nations and they could, therefore, not be brought to an end merely because this supervisory organ ceased to exist. Already, by strong implication, the Court intimates there that the continued operation or existence of the Mandate, including these substantive trust obligations, was not dependent upon there being a supervisory organ or upon reporting to a supervisory organ. That is the *prima facie* intimation which we find at this stage of the Opinion. We find that intimation confirmed by various other considerations in this Opinion. The majority of the Court proceeded in the next ensuing pages of the Opinion, up to the top of page 136, to deal with its conclusion and its reasons for the conclusion that the Mandate survived the League. It deals with those reasons, and it states its conclusion, without having regard at all at that stage to the question whether the obligation under Article 6 relative to supervision—reporting and accounting—whether that obligation is still in existence. Surely, if the view of the Court had been total inseverability between the obligation to report and account and the other aspects of the Mandate institution, then it could not come to a positive conclusion as to the continued existence of the Mandate institution in other respects before having regard to the question whether Article 6 survived in some form or another. Yet the Court did so, and therefore I submit the indications are very clear that the Court itself regarded the obligation under Article 6 as being severable from the other aspects of the Mandate institution. The Court very clearly in the passages as from page 133 to page 136 referred several times to conclusions already reached by it; particularly at the top of page 136

certain statements on the part of the Mandatory were referred to and the Court concluded: "In this case the declarations of the Union of South Africa support the conclusions already reached by the Court." And it is only after reaching these conclusions that the Court proceeds and says: "The Court will now consider the above-mentioned second group of obligations." [Including, then, Article 6.]

The Court proceeded to indicate at page 136 that the obligation incumbent upon a Mandatory State to accept international supervision and to submit reports was an important part of the Mandate system. The Court proceeded to describe it as something that was considered necessary for effective performance of the sacred trust. Now that is not a description of something which was regarded as absolutely necessary—as something without which the rest of the Mandate institution could not exist at all. And therefore, I submit, Mr. President, that on analysis it becomes very clear from the majority Opinion that it also regarded the obligation to report and account as being severable from the rest of the Mandate institution. And it is because of the premise upon which we argue this case—because of the premise that the Opinions were correct in 1950 to the extent of finding that the Mandate as an objective institution survived the League—because of that premise, we also accept for purposes of argument the premise of severability; so that a conclusion that the obligation to report and account has terminated does not necessarily result in a conclusion that the whole of the Mandate has also terminated and lapsed.

The next aspect of this obligation to report and account, which I have to stress as being of the utmost importance, is that its content was precise; its content was to report and account to a specific body—the Council of the League—to its satisfaction. One can hardly think of something more specific, more precise; not a general, vague concept of reporting to an international community, reporting to some international authority, reporting to the community of nations, or the like. It is very precise: a specific organ of a specific international organization and to the satisfaction not of the organization, but of that particular organ—the Council of the League. That body—the organ—was constituted in terms of the Covenant of the League under certain very specific provisions which provided for the manner in which the Council was to be composed and for the manner in which the Council was to operate, and particularly also for the manner in which the Council was to act in relation to other Members of the League or other States whose rights or interests might be affected by any action on the part of the Council.

Therefore, Mr. President, when I refer to the fact that the content of the obligation was precise in this sense, I am not referring to a technical consideration in this regard. I am referring to something which, as all the historical indications show, was of the utmost practical importance to the contracting parties who brought the mandate system into existence. It was of the utmost practical importance because of the inherent careful checks and balances that were to be found in the supervisory system as devised in the Covenant of the League, and in the attendant procedural arrangements in that regard, and already foreshadowed at the Peace Conference, where the compromise agreement in regard to mandates was entered into. Those checks and balances were specifically so devised as to protect the mandatories against interference with their administration which might be imprudent or unwise or unfair in certain

respects, and at the same time to have the effect, as was then considered beneficial for the population in those territories, that the supervision should carry within it a minimum of political element and a maximum of an expert independent approach. When we analyze the arrangements we find that in the first place the Council was composed as a relatively small and select body of the Great Powers and certain other Powers with them, and that the Council included within its number a number of mandatory Powers—Powers, therefore, who would know the problems of a mandatory, who would understand them, and who would be sympathetically inclined towards those problems and obstacles which a mandatory Power might encounter.

We find, secondly, that there was a rule which required unanimity for Council decisions and, thirdly, an attendant rule which required the Council to accord session on the Council to any Member of the League whose interests might be affected by a decision of the Council in a particular case. So, that would in each case have included the mandatory Power when the Council was about to take a decision affecting that particular mandate.

It does not matter for the purposes of my argument whether in these circumstances we have to look at the unanimity requirement as involving that the mandatory also had to agree to a Council decision in cases affecting the Mandate, or whether it did not involve that. For purposes of my argument I am perfectly prepared to assume that the mandatory's vote was not required, and that unanimity was only required as far as the other members of the Council were concerned. But even so, that in itself was an extremely important, practical safeguard and check against undue, against imprudent, against unfair interference with mandatory administration.

Then we find that part of the system was that the Council was to be advised by a Permanent Mandates Commission. This Mandates Commission was designedly composed not of political representatives of their governments, but of independent experts, who employed a non-political, impartial approach to their task as a supervisory authority—as they expressed it in a very well-known passage which is cited in our Preliminary Objections: "less as judges than as collaborators in a great cause".

And finally we find that this policy to which I have just referred—the policy of co-operation, of acting less as judges than as collaborators—was not something which originated with the Permanent Mandates Commission once it was formed, and once it started to function, but it was something that was inherent in the very approach to the Mandates system right from the very start and even foreshadowed at the Peace Conference itself, as we emphasized at pages 317-319 (**I**) of our Preliminary Objections. I will try to find the exact page. Yes, I refer to the bottom of page 318 of our Preliminary Objections, where we have a citation of something stated by Mr. Lloyd George at the Peace Conference on the 28th January 1919. [He]

> "said that he agreed with M. Clemenceau that if the League of Nations were made an executive for purposes of governing, and charged with functions which it would be unable to perform, it would be destroyed from the beginning. But he had not so interpreted the mandatory principle when he had accepted it.
>
> President Wilson said he too had not so interpreted it.

> Mr. Lloyd George, continuing, said that he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse"—

therefore, what I might term a conservative policy as regards the possibility of interference with mandatory administration, and a policy which did not only evolve in the lifetime of the League but which existed and was foreshadowed even at the Peace Conference, at the very birth of the mandatory system.

All these factors, singly and collectively, emphasize the practical importance of the fact that this obligation to report and account was precise, as far as its content was concerned; and, when I emphasize that, I am not speaking merely of a technical consideration but of one that was of the very essence of the arrangement, from a practical point of view, from an equitable point of view.

That, indeed, was in effect emphasized by the South African Prime Minister on the very occasion when this compromise agreement was entered into in regard to the Mandates system, when at length Australia, New Zealand and South Africa were prevailed upon to agree to bring the respective territories in which they were interested into the Mandates system as "C" mandated territories. He said on that very occasion—now reading from page 318 (I) of the Preliminary Objections—that:

> "Personally he felt very strongly about the question of German South-West Africa. He thought that it differed entirely from any question that they had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning, because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day who understood the position and who would not make it impossible for any mandatory to govern the country. That was why he said he would accept it."

That emphasizes, precisely and specifically, why it was so important for the parties to this compromise arrangement to know that the obligation to report and account was one relating to a specific supervisory body and no other.

In logic and in fairness it, therefore, cannot be inferred that when any mandatory Power was prepared to accept such an obligation, that carried with it willingness to submit to supervision on the part of any other supervisory authority not specified in the agreement at the time. The situation is very much analagous to what we find in almost all municipal legal systems, as far as I know, that when a master enters into a contract of service with a servant which involves the personal relationship of supervision and control on the part of the master, then almost invariably that is a contract which the master cannot assign without the servant's specific consent, because it is of the essence of the very arrangement that what the servant has agreed to is to serve a particular master, to obey him and to obey his instructions, and not to obey somebody else who might be chosen as a cessionary by that master.

I am speaking by way of a very broad analogy; but as a matter of logic and as a matter of equity and fairness, those same considerations enter into this arrangement between the mandatory Powers and the other Members of the League regarding supervision of their mandatory administration by the Council of the League, with the assistance of the Permanent Mandates Commission, and in terms of the specific arrangements containing the checks and balances to which I have referred.

Mr. President, because of the considerations which I have just stressed, we give examples, in our Preliminary Objections at pages 108-109, of what Mandatories clearly could not have been obliged to submit to, during the lifetime of the League, because of their consent to the obligations to report and account to the Council of the League. We give the example, for instance, if States that were not Members of the League had decided to form an organization, similar to the League, of their own. We know that there were times when a very large number of civilized States of the world did not belong to the League, and where it would not have been completely inconceivable that they could have formed an organization of their own. And suppose that in this international organization they provided for an organ which constitutionally would have been capable of exercising supervisory functions over mandatory administration. That, surely, alone, could not have made the Mandatory obliged to report and account to such an organ—to such a potential supervisory authority. Fresh consent, on the Mandatory's part, would be required for that purpose because the obligation would not only in form, but also in substance, be a different obligation from that which the Mandatory undertook by its consent to the Mandate Agreement. Similarly, if we take some of the international organizations which did come into existence, such as the International Labour Organisation, having for its Members largely the same States that were Members of the League, surely, there again, the same applies as in the case of the previous example. And even within the League of Nations, if there should have been an alteration of the provisions of the Covenant to the effect that supervision over mandatory administration was now to be handled by the Assembly of the League instead of the Council, and that the Assembly would, for that purpose, be able to come to a decision by a bare majority vote, or by a two-thirds majority vote, then surely that, in itself, would again alter not only the form but also the substance of the obligation for the Mandatory to submit to such supervision. That could not take place without the Mandatory's consent. Article 26 of the Covenant, indeed, makes that clear, in another sense, because the Article is to the effect that if a valid amendment of the Covenant receives sufficient support, for the purposes of being valid, it will operate but it will *not* bind any Member of the League that may not have supported it, although such a Member of the League may then lose its membership in the League. That is the effect of the Article, as I read it. Therefore, in the case of those Mandatories who were also Members of the League, if they were not prepared to assent to an alteration of the kind which I have just mentioned by way of an example, the position appears to be that they could *qua* Member of the League then be forced out of the League, but they could not *qua* Mandatory, as a party to the Mandate Agreement, be forced to accept that alteration as binding upon them without their own consent.

We submit, therefore, Mr. President, that because of this precise nature and content of the obligation, it necessarily came to an end with

the dissolution of the League; and upon there no longer being a Council of the League, as envisaged in the obligation itself—the Council of the League being the only supervisory body as to which there had been agreement for purposes of this obligation, the Council of the League being the body to do the supervision, to be satisfied with the reports—that Council falling away, the obligation became incapable of performance. And we stress that an obligation to report and account concerning mandatory administration to any organ of the United Nations, and particularly if it were to be the General Assembly of the United Nations, would, like the examples which I have just mentioned, involve a difference in substance, as well as in form, from the obligation undertaken by the Mandatory in Article 6 of the Mandate with which we are dealing—and, indeed, all Mandatories in respect of similar obligations in their Mandate. The substantive aspect—the aspect of practical importance of this difference—emerges in various respects. Again I emphasize that the distinction is not a technical one, it is one of the utmost practical importance.

In the first place, let us take it only on the basis of the legal situation. The United Nations was by deliberate design, as the Court knows, not constituted a general successor of the League of Nations. We all know what the position was, in that regard, of certain of the major Powers, particularly the United States and the Soviet Union, who took a leading part in the formation of the United Nations, and who particularly did not want any semblance of the United Nations being a successor of the League. We know, therefore, that anything that might resemble such a succession was studiously avoided. We know that, in so far as it was desired to transfer certain assets of the League to the United Nations, and in so far as it was regarded as desirable that the United Nations should take over, or continue, certain of the functions that had been exercized by the League, it was necessary to make specific *ad hoc* arrangement for such transfer and for such assumption, or taking over, by the United Nations and that was, in fact, done by a very elaborate arrangement.

We know that where (and this is where the practical importance of the distinction comes in) the United Nations Charter made provision for a trusteeship system which would, broadly speaking, correspond to the League Mandatory System, there were certain elements of very important practical difference, as far as supervision over trusteeship administration was concerned. The supervisory body, what we might call of the first instance, which would correspond broadly to the Permanent Mandates Commission in the case of the League, would be the Trusteeship Council; and the Trusteeship Council, in contrast with the Permanent Mandates Commission, would consist of political representatives of governments—of State Members of the United Nations. They would not be independent experts with a non-political approach, but they would be political representatives of their governments who would, in the normal course, receive instructions from their governments as to what political attitude to adopt in particular cases. One knows from experience that that is how is does go at the United Nations—that is the general practice and that is what is to be expected, and what must have been anticipated in a system of this kind; thus there is a distinction, not only of a technical nature, but one that could be of very major practical importance.

Secondly, we find that the ultimate supervisory authority, corresponding by analogy to the Council of the League, would be the General Assem-

bly of the United Nations; not a small and select body in which Mandatories could exercise some measure of influence, as was the case with the Council. It would be the Plenary General Assembly of the United Nations, consisting of all its Members, a large number of whom had never been Members of the League at all.

Thirdly, instead of the unanimity rule which prevailed in the League Council, decisions in the United Nations General Assembly could be taken either by a bare majority, or by a two-thirds majority on important questions, and, in the Security Council, in the event of trusteeship over strategic areas, a decision could be taken by an affirmative 7 votes out of a total of 11, except of course for the veto—a possible veto—by one of the five Permanent Members. So, again, we have, in the very structure of the supervisory machinery, these very important differences, which are unavoidable differences. They flow from the very structure of the Organization and they render the distinction between supervision by the one organization and supervision by the other not only a technical one, but one of the utmost practical importance. In addition, there was, in the case of the United Nations, no policy of conservatism as regards possible interference with mandatory administration corresponding to the policy which I outlined earlier this afternoon in the case of the League.

Therefore, having regard to all these factors of difference, it is, in my submission, a matter not only of technical law but also of logic and of ordinary equity or fairness, that a Mandatory could not merely by reason of its agreement to the obligation as originally set out in the Mandate Agreements to report and account to the Council of the League, be held liable to report and account to any one of these supervisory bodies on the part of the United Nations. There would have to be an act of fresh consent, or assent, on the part of the Mandatory, in order to render it liable to such an obligation. The question, in essence, therefore—the question regarding possible succession or non-succession in regard to Article 6—that question revolves, in essence, around the enquiry whether the Mandatory (the Respondent in this case) *ever* gave such consent by any binding juristic act, expressly or impliedly.

[Public hearing of 4 October 1962, morning]

Le PRÉSIDENT: L'audience est ouverte et j'ai le regret d'annoncer que l'état de santé de M. Alfaro, Vice-Président, ne lui permet toujours pas de prendre part à l'audience d'aujourd'hui.

La parole est à M. de Villiers.

Mr. DE VILLIERS: Mr. President, at the conclusion of yesterday's argument, we came to the point where I submitted to the Court that the consent of the Mandatory—of the Respondent—to the Mandate agreement, and particularly to Article 6 thereof, was not by itself sufficient to create an obligation on the part of the Respondent to submit to an obligation to report and account to an organ of the United Nations concerning Mandatory administration; that for this latter purpose fresh consent and agreement to such an obligation would be required on the part of the Respondent; and that the inquiry is therefore to be directed to this question whether such consent or agreement was ever given. I may say, in passing, that in dealing yesterday with the differences, in substance as well as in form, in supervision by United Nations agencies or organs as against supervision by the League machinery, I omitted to

refer the Court to a passage which is very pertinent in that regard, in the Advisory Opinion of this Court in 1955 concerning the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*. At page 75 of that Opinion there occurs this passage:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment."

I proceed, Mr. President, with this inquiry, whether there was ever any fresh consent or agreement on the Respondent's part to an obligation to submit to United Nations supervision regarding the Mandate. And immediately the further—I might say component—questions present themselves as to when and to whom such consent could conceivably have been given. As regards the time when it could have been given, that could possibly have been any time as from 1920 until now, but, more probably, when historical events are taken into account, if such consent had been given at all, one would have expected it to have been given during the period which we, for convenience, called the period of transition, meaning thereby, transition generally in world organization as from the era of the League of Nations to that of the United Nations; the period, in other words, 1945 to 1946 when the United Nations was formed, when it was constituted, when it was set into operation and when the League was disbanded and eventually dissolved. One would expect that if there was consent to an obligation to submit to supervision on the part of the United Nations, it would have been given either during that period or possibly shortly thereafter. Again, as to possible parties to whom such consent could have been given, one would have expected either the Members of the United Nations, or the United Nations as an organization, or the Members of the League, or the League as an organization, or to all these groups that I have mentioned. There are variants within this number, of course, but that appears to be the circle within which one could expect that such a consent would have been given, if at all.

Now, it seems to be common cause that such consent was never expressly given; nowhere in the pleadings do the Applicants allege that such consent was ever expressly given. Indeed, in the majority Opinion of 1950, there was a specific acknowledgment that there was never such express arrangement. One finds that at page 136 of the Opinion: "Some doubt might arise from the fact that the supervisory functions of the League with respect to Mandated territories not placed under the new trusteeship system were neither expressly transferred to the United Nations nor expressly assumed by that Organization." That, of course, refers to a general transfer of functions, but also more specifically to the case of the Respondent. The Court nowhere finds that there was any express submission to supervision by United Nations supervisory machinery. And the question that remains, therefore, is whether such consent was ever given tacitly. On the principles with which I dealt yesterday, the inquiry would therefore have to be whether, from all the relevant evidential data, there can be drawn a necessary inference of such

tacit consent, necessary in the sense of excluding all other reasonable inferences and of being consistent with all the relevant facts.

In the 1950 proceedings, if I understand those opinions correctly, the Court differed on that question whether on the facts and information as then presented to the Court, such a necessary inference could be drawn. That is why it is of such extreme importance, as I stressed yesterday, that we are presenting to the Court further evidential data, further evidential material, which we submit to be of utmost importance and which, in substance, alters the totality of the facts from which an inference is to be drawn, so that this Court need not be placed in the position of having to choose between the reasoning of the majority and the minority in the 1950 proceedings on this particular question. The question is, in substance, a new one on the evidential material that is now presented to the Court. I will deal with the question of what the evidence shows and of what inferences are to be drawn from the evidence. I will deal with that first in the light of the facts as now before the Court, and I shall stress afterwards the particular significance in that regard of material which is now before the Court and which was not so in 1950.

First of all, when regard is had to the Charter of the United Nations, we find that it makes specific provision for United Nations supervision of administration under trusteeship agreements voluntarily entered into, but it makes no mention of any supervision in regard to Mandates not converted into trusteeship. This indicates in our submission, Mr. President, at least *prima facie*, that on the part of the authors of the Charter there was never any contemplation of such supervision of Mandatory administration in the case of a Mandate not converted into trusteeship. Or alternatively, if there was any such contemplation at all, it was left for subsequent arrangement—something additional to the Charter, something subsequent to the Charter, something possibly by way of amendment of the Charter—but the Charter itself made no provision therefor. In addition, during the San Francisco Conference, the Respondent's representative made a statement which we set out in the Preliminary Objections at pages 237-238 **(I)** and that statement read as a whole, Mr. President, renders clear, in our submission, that on the part of South Africa there was no intention at that stage to be committed to the United Nations in any respect in regard to South West Africa, either in regard to entering into trusteeship agreement or in regard to any other arrangement. In fact, the statement makes it clear, if we refer to the portion at page 238 of the Preliminary Objections, that the whole question of this claim which South Africa intended to put forward as regards incorporation of South West Africa into the Union, as at that time, was intended to be presented at that stage not to the United Nations itself, but to a peace conference that was apparently contemplated at that stage. We read at the top of page 238:

> "The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.
>
> As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the Mandates question."

The implication then is clear, that what was intimated by the South

African representative was that the other delegates were to understand clearly that there was to be no commitment as far as South West Africa was concerned on the part of the Union towards the United Nations. That is rendered further clear by a comment in the very next paragraph, at page 238 (I) of our Preliminary Objections, when there was about a year later a reference back to this statement by Field-Marshal Smuts. He stated there that the purpose of this statement was that such consideration of this question should not be prejudiced by any prior commitment on the part of the Union Government by virtue of its membership of any organization which might replace the League of Nations. So, when these factors are taken into account, it seems most unlikely that there could have been any tacit understanding on the part of the founders of the United Nations, including the Respondent, to the effect that there would be United Nations supervision in respect of Mandates not converted into trusteeship.

But in any event, Mr. President, there is a further way of testing whether there was any such contemplation, and that is this consideration, namely that if there had been any such understanding one would surely have expected it to have been raised in some way or other during the deliberations of the Preparatory Commission and the first portion of the first session of the United Nations General Assembly, when special attention was given in the two resolutions—XIV and XI—to the question of the taking over of certain assets and also certain functions and powers by the United Nations as from the League of Nations. If there had been contemplation, as I say, of such supervision over Mandates not converted into trusteeship, that would have been the stage at which one would have expected it to have come to light and to have been mentioned, and that would therefore afford a next testing point at which one can see whether there could have been such a contemplation at all.

Mr. President, we deal very fully, in the Preliminary Objections at pages 239-247 (I) and then again at pages 325-328, with the two resolutions XI and XIV, as adopted at the first part of the First Session of the United Nations General Assembly in London in early 1946, and the history—the preceding history—of these resolutions in the Preparatory Commission and its Committees.

I will not go into that matter fully again. I merely wish to draw attention to some of the very pertinent indications of intent, as far as is relevant for our argument—our present purposes—that are afforded by this portion of the record.

Now, our submission is that these resolutions and their history show very clearly that the United Nations did not consider itself to be a successor in law automatically to any of the League assets or functions, and that the founders of the United Nations, therefore, contemplated special arrangements for the transfer of particular League assets and for the assumption of particular functions and powers; and when it came to the functions and powers they even took trouble, at the instance of certain delegations, to avoid the word "transfer" because those delegations expressed the fear that the use of that expression might, and I quote from the United Nations records, "imply a legal continuity which would not in fact exist". We deal with that point in the Preliminary Objections at page 241 (I) and we give the references to that portion of the debate.

It was that concern which resulted in an alteration of the wording in

these arrangements. The Committees and Sub-Committees had initially proposed a "transfer" of functions and powers, and that word was altered later to "assumption" on the part of the United Nations of particular functions and powers.

Resolution XIV was the one that dealt with this transfer of assets and assumption of powers, and it contained in its Part I, paragraph 3 (B), which we cite at page 242 **(I)** of our Preliminary Objections a statement of general willingness on the part of the General Assembly of the United Nations to continue to exercise certain League functions. But when regard is had to the wording one finds that this was confined to non-political functions. When it came to political functions, there was a different part of the resolution which dealt with that. It was Part I, paragraph 3 (C), which we cite in our Preliminary Objections at pages 242-243 **(I)**, and there the Court will see that the provision was that:

> "*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..."

So, if resolution XIV could be regarded as being possibly appropriate at all to a question of supervision of Mandatory administration, which was a political matter, then the matter would have had to be dealt with in terms of this portion of resolution XIV.

But, on analysis, Mr. President, it will be found that from a practical point of view the procedure as envisaged here could hardly have been regarded as being appropriate to the case of mandates, particularly if one viewed mandates as being an arrangement as between a Mandatory, on the one hand, and the League of Nations and/or all the Members of the League, on the other hand. It would not be easy to arrange a request from the parties under circumstances of that kind. Therefore it is not surprising to find in the history of this resolution that, on the part of its proposers at any rate, it was not designed to cover the case of Mandatory administration or supervision over Mandatory administration; because if we look back in the history to the Committees and the Sub-Committees, we find that at an early stage an exception was made in regard to Mandates. There was stated—the Court will find that at page 239 **(I)** of our Preliminary Objections—that:

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

If we trace that through the documents we find that perhaps that reference to "Part III, Chapter IV" is not very apt. But we do trace in the history of resolution XI, which dealt with the putting into operation of the trusteeship system, that there was a special reference to this question of supervision of Mandatory administration. We find that dealt with in the Preliminary Objections at page 244 **(I)**. The only point I wish to make at the moment is that that indicates clearly that resolution XIV was not even intended, by its proposers at any rate,

to cover the case of Mandatory administration or supervision in respect thereof.

When we then come to resolution XI and its history, we find that the proposal in the Executive Committee of the Preparatory Commission was that there should be constituted a Temporary Trusteeship Council and that its functions would be *inter alia* to

"advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates system". (Doc. PC/EX/113/Rev. 1, 12th November, 1945, p. 56.)

So here, then, was a specific, express proposal to do something in regard to the possible transfer to the United Nations of functions of the League regarding Mandates. But, Mr. President, we find in the further history of this resolution XI that this proposal was not adopted. It was dropped in the Preparatory Commission itself and nothing was substituted for it in regard to possible transfer of, or assumption by, the United Nations of League functions in regard to Mandates. The proposal was dropped, nothing was substituted for it, and in the end we find that resolution XI in effect merely urged the Mandatory Powers to submit trusteeship agreements as soon as possible. That is the effect of the resolution. We cite the resolution at page 247 **(I)** of the Preliminary Objections, and we deal with it again at page 327 **(I)**.

The Assembly knew by that time that in certain cases such trusteeship agreements would not be submitted. It knew, by reason of the reservations that South Africa had made, that South Africa would not be submitting a trusteeship agreement, that the position was still one where the population would be consulted in regard to a possible incorporation into the Union. And it also knew in regard to Palestine that the United Kingdom had said specifically that the matter was subject to an enquiry by the Anglo-American Commission of Inquiry and that for the time being no proposals would be made in regard to Palestine at all. Even in the case of the former Japanese Mandate the position was completely uncertain and nobody knew exactly what was going to happen.

These, therefore, are the outstanding features of the history of those two resolutions as they are pertinent for our purposes, and they, in my submission, demonstrate very clearly that there could not have been a tacit understanding on the part of the founders of the United Nations to the effect that supervisory functions of the League regarding Mandates not converted into trusteeship would be transferred to the United Nations without anything more being required to be done in that regard.

In the first place, the Members of the United Nations must have realized that if there was to be any such transfer, then co-operation on the part of the League itself would be required for that purpose. To demonstrate that by way of an extreme: Suppose the League at the last meeting of its Assembly had decided that all Mandates should be cancelled—there was at one stage some talk of that possibility—but let us suppose that had been a possible resolution on the part of the League Assembly at its last meeting. Then, on that basis, there would have been nothing to transfer. There would have been nothing to assume on the part of the United Nations. And, surely, there must have been

that contemplation—that knowledge—on the part of the founders of the United Nations that, for this reason, some co-operation on the part of the League itself would be required if there was to be such a transfer. In fact, in regard to all the other transfers there was such co-operation, and it was expected beforehand; it was actually solicited by the United Nations. It was expected, and it was solicited by the form of resolution XIV, taken at the first portion of the First Assembly meeting. That resolution was laid before the League Assembly at its last session and it served as a basis for corresponding resolutions taken at that last session of the League, so that the matter of a transfer of assets and an assumption of functions and powers could be arranged so far as was necessary by way of co-operation between these two organizations and representatives thereof. Therefore again, in the case of possible taking over of supervision in respect of Mandatory administration, the realization must have been that there would have to be similar co-operation, and, for that reason alone, it seems most unlikely that the matter would have been left to a tacit understanding and that there would not have been some express arrangement about it, if that had been the contemplation. Indeed, when we find that there is a concern not to imply a legal continuity which would in fact not exist, if we find that all the elaborate arrangements are made in the other respects for a transfer of assets and assumption of functions and powers, one cannot understand why this question in regard to mandates supervision should have been regarded as something that "went without saying".

The very proposal, Mr. President, which existed at one stage for a Temporary Trusteeship Council, that proposal showed that there could not have been a general contemplation that this was a matter that spoke for itself, that did not require special and explicit arrangements. The mere fact that there was such a proposal shows that there was a contemplation that if there was to be a transfer of functions in this regard it would have to be specially provided for. But that proposal, as I have pointed out, fell away eventually. The inference appears to be that it did not obtain sufficient support in order to be adopted as portion of a resolution. I cannot put it higher than that. I cannot say that that must necessarily have been the position, but there is at least a strong indication of probability that that proposal could not obtain sufficient support, and therefore the indications of probability are against there having been a general contemplation, tacit or otherwise, that there would be a transfer of League functions of supervision in regard to Mandatory administration.

The probabilities are much rather that the contemplation was that this would be a matter to be left to individual treatment in every case. Each one of the Mandatories, except for the case of the previous Japanese Mandate, had made a statement regarding its position—its intentions—in regard to the mandated territories. There were the differences pertaining to the various cases, and the probabilities are that the general contemplation was that each case would be dealt with separately and that an appropriate arrangement would be found in each case.

Mr. President, I turn next to the proceedings at the last session of the League Assembly, with a view to seeing what evidence those proceedings provide as regards this question of intent—intent on the question whether any League supervisory functions regarding Mandates were to be transferred to the United Nations in cases outside of trusteeship.

We find that, after consideration of the United Nations resolution XIV, the League Assembly adopted resolutions to facilitate the assumption by the United Nations of League functions, powers and activities, but the resolution was confined to functions, powers and activities of a non-political character. In regard to those of a political character there was no resolution at all on the League side. Obviously, then, the intention must have been to leave these in general to the *ad hoc* treatment which had been envisaged in the United Nations resolution XIV, part I, 3 C—the one that I read to the Court before—namely a specific request from the parties in each case to be specifically dealt with by the United Nations organs.

Now, more particularly in regard to Mandates, we find a very significant indication of intent in the history revolving around the original proposal by China, which is set out at page 253 (I) of our Preliminary Objections. The Court will find that that proposal—the draft resolution proposed—reads as follows:

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

In other words, what was envisaged here was this time-lag between the dissolution of the League and the constitution of the Trusteeship Council because, as the Court knows, the Trusteeship Council consists partly of representatives of administering authorities, and prior to the entering into of trusteeship agreements there could therefore not be a constitution of the Trusteeship Council; so there would necessarily be a time-lag between the contemplated dissolution of the League and the time when the Trusteeship Council could begin to function and begin to exercise its supervision in respect of trusteeship agreements. That period—that interim period—was seen by the representative of China as constituting a possible threat to the continuation of supervision in respect of Mandatory administration. He wanted to avoid a period of *interregnum* in that regard, and he therefore proposed expressly that the Assembly should express itself as considering that the League functions as supervisory organ should be transferred to the United Nations, particularly in order to avoid that period of *interregnum*. He proposed an express resolution recommending that the Mandatory Powers should for that period continue to submit annual reports on the territories.

Therefore, the question of possible United Nations supervision regarding Mandates not converted into trusteeship was not, at this last session of the League Assembly, treated as something that "goes without

saying", something that could be left to tacit understanding. There was a proposal here to deal with it expressly and specifically. And one sees that as the events progressed at the last session of the League Assembly the only inference that can be drawn is that this proposal could not muster sufficient support in order to be carried as a unanimous resolution at the last League Assembly; because one finds in the subsequent history that there were negotiations, and, resulting from these negotiations, one finds in the First Committee there was later a report that there had now been an agreed draft, to which everybody had agreed, including the representative of China who then, indeed, proceeded to be the introducer of that agreed draft, and that draft became the eventual resolution regarding Mandates. The matter is so important because of the significant contrasts between the resolution as eventually adopted and this earlier proposal on the part of the representative of China. In paragraph 3 of the resolution as adopted, the Assembly "Recognizes that, on the termination of the League's existence, its functions with respect to the Mandated territories will come to an end..."—I am reading from the wording of the resolution as set out at page 255 (I) of the Preliminary Objections. There it recognizes that on termination of the League's existence its functions with respect to the Mandated territories will come to an end. But it "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". In other words, in spite of the recognition that those functions of the League would come to an end, nothing is said about the possibility of transfer of those functions to cover this period of *interregnum*—possible period of *interregnum*—as had been previously proposed in the Chinese draft. All that the resolution proceeded to do was to note that there were corresponding principles in Chapters XI, XII and XIII of the Charter. In other words, nothing was done in order to have a transfer for the period of *interregnum;* everything was left to be dealt with exclusively in accordance with the provisions of the Charter in that respect, in Chapter XI, Chapter XII and Chapter XIII; XII and XIII contemplating the possibility of trusteeship agreements and Chapter XI dealing generally with non-self-governing territories.

The resolution goes on, in paragraph 4, to state that the Assembly:

> "Takes note of the expressed intentions of the members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates until other arrangements have been agreed between the United Nations and the respective mandatory powers." (*Preliminary Objections*, p. 255 **(I)**.)

In other words, the Assembly contemplates that there may be other arrangements agreed upon between the United Nations and the respective Mandatory Powers. It contemplates a specific agreement in each case, a specific arrangement that may be agreed between the United Nations and the respective Power; and it also contemplates, as did the original Chinese proposal, that there would be an interim period pending such further arrangements. In regard to that interim period it also expresses itself as taking note of expressed intentions of the Members of the League in regard to that period. But all that those intentions amounted to were intentions regarding the administration of the territories for the well-

being and development of the peoples concerned—nothing in regard to reporting or accounting, as had been expressly proposed and visualized in the original Chinese proposal. And those omissions, I submit, Mr. President, especially by way of this contrast, are very significant. They demonstrate, in my submission, very clearly that there was a total absence of contemplation of a general transfer of League functions of supervision regarding Mandates for this interim period; that the proposal for effecting such a transfer could not achieve the necessary support, and that that in itself indicates that there was no general agreement about it.

Mr. President, further emphasis on the contrast which I have just referred to—the contrast between the resolution as eventually adopted and the proposal contained in the original draft submitted by China—further emphasis on that contrast is to be found in what the representative of China is reported to have stated in introducing the agreed draft which eventually became the resolution. We find an extract from what he stated at page 254 **(I)** of the Preliminary Objections, and I would like to direct the Court's attention thereto.

> "In proposing the new draft resolution, Dr. Liang 'recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the transfer of functions from the League to the United Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but [I emphasize] the functions of the League in that respect *were not transferred automatically* to the United Nations. The Assembly should therefore take steps to secure the continued application of the principles of the mandates system'."

I pause there for a moment. The speaker draws attention again to the fact that there was no automatic transfer of functions and that it was therefore necessary for the Assembly to take steps. The matter could not be left unsaid; something specifically had to be done in regard thereto.

But now, Mr. President, instead of moving to the next logical stage as he had done in his previous proposal, namely, to propose that something expressly should be resolved by the Assembly in regard to this intervening period, he goes on to say that:

> "As Professor Bailey had pointed out to the Assembly on the previous day, the League *would wish to be assured* as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates." (*Preliminary Objections*, p. 254 **(I)**.)

In other words, the reference is now purely to the statements, to the assurances, that had been given to the Assembly by the various representatives of the Mandatory Powers. And he proceeded to say:

> "It was *gratifying* to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers *had announced their intention* to administer the territories under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon. It was to be hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply *in full* the *principle of trusteeship* underlying the mandates system." (*Preliminary Objections*, p. 254 **(I)**.)

In other words, there was no contemplation here that there would be anything in regard to report or accountability or supervision in the intervening period. Everything was placed on a hope of full application of the principles of trusteeship by the future arrangements to be made. For the interim, there was only a contemplation of continued administration by the Mandatory Powers in accordance with their obligations under the Mandate system.

Indeed, then, if we refer to the wording of the various statements by Mandatory Powers to the Assembly, we find this point further emphasized, that not a single one of them referred to any intention to render reports for the interim period until such time as they might make other arrangements with the United Nations. Their intentions, as expressed regarding that interim period, were confined entirely to the matter of administration in the territories themselves, and indeed, in the case of three of those statements, the suggestion was very pointed, that in the meantime there would be no reporting as there had been before and as had been required in the respective report articles of the Mandates. So, for instance, if we refer to the statement by the representative of South Africa—which we find at pages 250-251 **(I)** of the Preliminary Objections —we find that there is a statement first of the intention to consult the population and to lay proposals in that regard before the General Assembly of the United Nations; and then, as for the interim, we find this statement at page 251:

> "... In the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held"—

in other words, during the period when there could be no reporting and when there was in fact no reporting and no supervision; the suggestion being that that was the position which would now be continued.

> "The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate." (*Preliminary Objections*, p. 251 **(I)**.)

Again, very pointedly, that very same suggestion. When we look at the statement by the representative of Australia, the position becomes, if anything, clearer, for this reason, that the Australian representative rendered clear that in his view there would be an obligation in the interim period to submit information in terms of Chapter XI of the United Nations Charter—Article 73*(e)*—which of course is a very much less onerous and stringent obligation than reporting and accounting in respect of compliance with substantive trust obligations under a mandate. This Article is to the effect that the Members of the United Nations who have responsibilities for Non-Self-Governing Territories undertake to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible,

other than those territories to which Chapters XII and XIII apply. Whether this contemplation was legally correct or not does not matter for my purposes, Mr. President; whether in fact there was a legal obligation in the interim to submit information in terms of this Article does not really matter. What does matter is that the Australian representative, if there had been any contemplation on his part that there would be a continued obligation to report and account in terms of the relevant provision of the mandate agreement, could not have stated a contemplation that this lesser obligation would apply in the meantime. The representative stated that "After the dissolution of the League of Nations"—I am reading from page 252 **(I)** of our Preliminary Objections—

> "... After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety.
> Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect. Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants."

So, there again, the undertaking is confined to the manner of administration. And then, further on:

> "... In due course these territories will be brought under the trusteeship system of the United Nations; until then, the ground is covered not only by the pledge which the Government of Australia has given to this Assembly today [relating to the manner of administration] but also by the explicit international obligations laid down in Chapter XI of the Charter, to which I have referred." (*Preliminary Objections*, p. 252 **(I)**.)

That previous reference is not given there. I might give it to the Court. It is from page 47 of the Special Supplement No. 194 of the *League of Nations Official Journal* dealing with this last meeting, and there it is stated—there is a reference to Chapter XI of the Charter, with a further comment:

> "... Amongst other things, each administering authority under that chapter undertakes to supply to the United Nations information concerning economic, social and educational conditions in its dependent territories."

That mere contemplation, as I have submitted, excludes a contemplation of a more onerous obligation to report in terms of the relevant provision of the Mandate Agreement.

Finally, we find that the United Kingdom's representative expressed the intention of his Government in this form: he referred to the intention to place certain territories under trusteeship, depending on negotiation of satisfactory terms, and then, as regards Palestine, he

said that that could not be decided until the Anglo-American Committee of Enquiry had rendered their report, but then:

"... until the three African territories have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—whatever those arrangements may be—it is the intention of His Majesty's Government in the United Kingdom to continue to administer these territories in accordance with the general principles of the existing mandates". (*League of Nations, Official Journal. Special Supplement*, No. 194, p. 28.)

I stress "the general principles of the existing mandates". A rather interesting light on what appears to have been intended with that expression is provided by the Report of the Special Committee on Palestine, from which we cite in our Preliminary Objections at page 335 (I), where we find this statement from that Report:

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

This is a report by the Eleven-Nation Committee, not by the United Kingdom itself; but it seems most unlikely that this explanation could have been given for that statement had it not been obtained at the statement's very source. And that, indeed, appears to be the only logical explanation for that wording: that although the substantive provisions would be followed in the meantime, that would be by way of general principle, because there could meanwhile be no reporting. Therefore, on analysis, a very clear contemplation, intimated to the General Assembly, that there would, in the interim period, be no reporting or accounting.

Mr. President, our submission is then that the events at the final session of the League Assembly show very clearly, not only an absence of a contemplation of a transfer of League supervisory functions regarding Mandates to the United Nations in respect of territories not converted into trusteeship, but that there was a widespread contrary understanding, namely, that there would be no report and accountability in that regard.

I proceed to deal with the negotiations between the Respondent and the United Nations subsequent to the dissolution of the League, in order to point out that from those negotiations again there never resulted any agreement, or any consent on the Respondent's part to submit to United Nations supervision in respect of administration under the Mandate. There was initially the proposal regarding the recognition of incorporation, to which the General Assembly would not accede. There was the counter-invitation of the General Assembly to the Union of

South Africa to submit a trusteeship agreement, to which the Union would not accede for the reasons it gave. There were further proposals from the side of the Union Government in regard to new arrangements that might be entered into. These were not acceptable to the United Nations or its negotiating agencies. So that there was, in general, no agreement, no "arrangement" "agreed" upon between the Union and the United Nations. There was for a period a submission of information in accordance with, or broadly on the same basis as envisaged in, Article 73 of the Charter, for information purposes only. But in regard to that submission of information, it was made clear from the outset that the information was submitted on the basis that there was no obligation at all, as far as the Union was concerned, to submit any information whatsoever; that it would be voluntary and that the Union would submit it on the condition that the information was not to be dealt with as if a trusteeship agreement had, in fact, been concluded. It was coupled with an express denial of any accountability to the United Nations. These conditions were never accepted by the United Nations and, indeed, the information was treated eventually as if it involved accountability, and for that reason the practice was desisted from of supplying that information. There was therefore, Mr. President, no agreement, either express or implied, even in regard to submitting information in accordance with Article 73 *(e)*, and much less to submit information by way of reporting and accounting as regards compliance with substantive obligations under a Mandate.

The Applicants do not appear to allege that any agreement came about relative to the present case in this history of negotiation between us and the United Nations. But I mention it for this purpose, namely that there appears to be some misunderstanding, judging from certain things I have read, about what the position was in this regard and particularly also as to what the finding of the majority of the Court was in this regard in 1950. We find, for instance, in a dissenting Opinion by five judges in 1956 on the question of the hearing of oral petitions, this statement at page 65 of that Opinion:

> "An important element of the situation then existing was referred to on a number of occasions by the Court in the reasoning of its Opinion [referring to the 1950 majority Opinion]: that is, the willingness expressed by the Union of South Africa to regard itself as continuing to exercise its Mandate, to continue to administer the Territory in accordance with the provisions of the Mandate and to continue to render reports to the United Nations."

There was, in fact, never any such willingness expressed as regards continuing to render reports, if by that is meant reporting in terms of the Mandate obligation, and the Court, in 1950, never found that there was anything of the kind. There seems to be a similar misunderstanding on the part of the late Judge Lauterpacht; I am reading from his *Development of International Law by the International Court* at page 170. He says there—in discussing a principle of interpretation:

> "... Thus in the Advisory Opinion on the *International Status of South-West Africa* the Court held that certain declarations made by the Government of the Union of South Africa constituted a recognition on its part of its obligation to submit to continued

supervision in accordance with the Mandate and not merely an indication of its future conduct."

In fact, Mr. President, there was no such declaration by, or on behalf of, the Government of the Union, and the Court did not find in 1950 that there was any. The Court did refer to declarations which implied the continued existence of the Mandate, but nothing which implied acceptance of United Nations supervisory powers in respect of the Mandate.

We deal further, Mr. President, in our Preliminary Objections, with a section which we call the Practice of States. We do so at pages 334-337 **(I)** of the Preliminary Objections, and as the matter is set out quite fully there, I do not propose to deal with that in detail. I merely want to emphasize certain salient features which emerge from it. The first is—perhaps I should put it on this basis—that if, during the transition period of 1945 to 1946, there had then been a tacit agreement or understanding that there would be continued reporting and accounting under Mandates not converted into trusteeship, then one would have expected that understanding to have been referred to shortly thereafter on several occasions. We refer to some of these. One, for instance, is the fact that in the case of Nauru and in the case of Palestine, the "other arrangements agreed" upon came as late as two and two and a half years respectively after the coming into force of the Charter, one and a half years and two years after dissolution of the League. There was that long intervening period, and in that time nobody ever suggested that in respect of those two Mandates, which in the meantime remained in existence, there should be reporting or accounting to the United Nations. We refer to the report of the Eleven-Nation Special Committee on Palestine—Australia, Canada, Czechoslovakia, Guatemala, India, Uruguay, Iran, the Netherlands, Peru, Sweden and Yugoslavia—of whom eight had also been Members of the League at the time of its dissolution some seventeen months before this report. There we have the explicit statements of which I have read one or two to the Court (there are others set out which I am not going to read) to the effect that, according to their understanding, with the disappearance of the Council of the League and the Permanent Mandates Commission there was an end of the obligation of report and accountability in terms of the Mandates. Perhaps I should just read this; the conclusion then is that in the case of Palestine:

> *"The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system"* (*Preliminary Objections*, p. 335 **(I)**).

that is, by reporting and accounting to some supervisory organ. So, if there had been any contemplation of an obligation on the part of Mandatories to report and account in terms of the Mandate to any United Nations supervisory organ, then surely it would have been stated there. But, in fact, the very contrary understanding is stated by these eleven States. The same contrary understanding emerges from the statements made in various circumstances in various debates between 1946 and 1948 by representatives of New Zealand (I am referring to pages 336 and 337 **(I)** of our Preliminary Objections), of the Soviet Union and of the United

States of America, clearly intimating that, in their view of the situation, outside of trusteeship there could be no question of United Nations supervision in respect of Mandates. The New Zealand representative apparently had a difficult time about the terms of the draft trusteeship agreement, and he eventually said that if any terms were attempted to be forced upon him there might be no agreement at all, and "in this eventuality, New Zealand would have to carry on without the privilege of the supervision by the United Nations, which it desired".

The Soviet Union's statement was made with reference to the Mandate previously held by Japan. The question arose whether the Security Council could express itself on the question whether or not Japan had violated the terms of the Mandate, and the Soviet Union's attitude was that it could not do so because "there is no continuity, either legal or otherwise, between the Mandatory system of the League of Nations and the trusteeship system laid down in the United Nations Charter. There is, therefore, nothing which might entitle the Security Council to discuss this question, let alone take any decisions on it." The further reasoning proceeds on the same lines.

The United States representative in regard to a debate on Palestine said:

> "The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The record seems to us entirely clear that the United Nations did not take over the League of Nations Mandate system." (*Preliminary Objections*, p. 337 (I).)

Mr. President, we take then the eleven States in the case of the report on Palestine, plus these three States, making a total of fourteen—about a quarter of the membership of the United Nations at the time. These statements are made apparently without any contradiction at all, in various circumstances of interest or counter-interest, not all in respect of the same matter where there may be a grouping of interests, and made very soon after the period during which such tacit understanding, if it existed, would have manifested itself. I submit that, as a matter of circumstantial evidence, the weight to be assigned to these expressed contemplations and understandings of the situation must be considerable. It must be very much more than attitudes that might have been taken up later by various States specifically in regard to the Mandate on South West Africa when sides had already been taken, when matters of prestige, and possibly emotion, came into the picture. In any event, I shall deal later, in reply to an argument by the Applicants, with the attitudes that were shown by States, Members of the United Nations initially on this question, during the years 1947 to 1949: I will come to that later. But quite apart from that, these attitudes shown in respect of the other Mandates—other than South West Africa—in this variety of circumstances, very strongly, in my submission, show that there was a widespread understanding and contemplation that, in the absence of trusteeship agreement, there would be no supervisory function on the part of the United Nations and no obligation to submit to any such supervision on the part of the Mandatory Powers.

Mr. President, it is against the background of the evidential material which I have now particularly emphasized that I would like to deal, with respect, with the Advisory Opinion of 1950 on this question of

report and accountability—the majority Opinion in that regard—in order to develop our contention that the information which we now put before the Court, and which was not before the Court in 1950, is of crucial importance for an evaluation of this Opinion.

First, it becomes necessary to interpret the reasoning in that Opinion relative to the question under discussion, and I must admit that there are various interpretations. Commentators have differed as to the exact manner in which that reasoning is to be interpreted. We find that difference of opinion, for instance, in the 1956 Opinion concerning the question of hearing of oral petitions, a difference of opinion apparently between the Judges who concurred in the majority judgment in 1956 as against the Judges who concurred in the minority Opinion in that year; they differed as to the interpretation to be put upon the relevant reasoning in 1950. The Applicants and we also differ about it, judging by the contentions on the written pleadings before the Court. And there also appears to be a difference of opinion in the writings of commentators. Our submission is that, on analysis, that reasoning is to be understood as resting on an implication of tacit agreement or understanding on the part of the Members of the United Nations at the time of its establishment and corresponding tacit agreement on the part of the Members of the League at the time of its dissolution to the effect that, and I quote from the Opinion, "... the supervisory functions [are] to be exercised by the United Nations..."; and to the effect, further, that Mandatories would be obliged to submit to such supervision pending or failing trusteeship or other agreement. That is, in our submission, the *basis upon which the Opinion, on analysis, rests—an implication of* such tacit agreement on the part of United Nations Members on the one hand and Members of the League on the other. That, in our submission, is really the only logical and juridical explanation that can be given of that reasoning when, with respect, it is analyzed. And we submit that it is because of resting on such an implication that the evidential material to which I have referred, which is now placed before the Court for the first time, assumes such very crucial importance.

Now, first, in regard to this interpretation of the reasoning. I have already referred the Court to the passage at page 136 of the 1950 Opinion, where the Court said that

> "... Since the Council disappeared by the dissolution of the League, the question arises whether these supervisory functions are to be *exercised by the new international organization* created by the Charter, and whether the Union of South Africa is under an obligation to submit to a supervision by this new organ and to render annual reports to it."

Then this passage follows:

> "Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization."

So, the reasoning begins with this acknowledgment that there was no express arrangement. That in itself suggests that the reasoning to *follow would be likely to rest upon an implication of a tacit arrangement*

or understanding. And, indeed, when one analyses the reasoning that follows, one finds that that suggestion is confirmed by it. In the first place, by just looking at it superficially and seeing what is the key word in the various sentences of the reasoning, one finds this: one finds there is a reference to what the authors of the Covenant "considered" when they created the system; we find a reference to what the authors of the Charter "had in mind" when they organized the international trusteeship system; we find, in regard to Article 80, paragraph 1, at the bottom of page 136, that there is a reference to what the purpose "must have been". And then there is a reference to the last resolution of the League Assembly, and the crucial sentence at the end refers to what the resolution "presupposes"; it "presupposes that the supervisory functions of the League would be taken over by the United Nations". Now, all those words indicate that what the Court was referring to was what these parties had in mind without expressing it, because in each case the reference is not to something to be expressly found in the treaties or the provisions of the resolutions in question, but to what, according to the reasoning of the Court, is to be inferred therefrom. That by itself indicates that the reasoning is founded on an implication of tacit arrangement, agreement or understanding.

[Public hearing of 4 October 1962, afternoon]

Mr. President, I was dealing at the adjournment with the interpretation of the 1950 majority Opinion on the question of supervisory functions, and my submission to the Court was that both as regards the structure of the reasoning and as regards the language of the crucial portions thereof, the indications are that what the majority of the Court had in mind as the basis of its reasoning was a tacit agreement, or understanding, as between Members of the League on the one hand and Members of the United Nations on the other hand.

I propose to continue to analyze the substance of the reasoning, and I submit that that analysis will further confirm what I have just submitted, and that is that it was such a tacit agreement or understanding that the Court had in mind.

We find that the reasoning falls to be divided into four parts. Beginning at page 136 of the Opinion, the four parts are divided into four paragraphs in the text. The first one is what the Court itself described as "general considerations". Then followed a paragraph concerning Article 80, paragraph 1, of the Charter. Then a paragraph concerning the last resolution of the League Assembly regarding mandates. And the fourth, and last one, deals with the competence of the General Assembly of the United Nations to exercise supervision and to receive and examine reports.

This last one refers to Article 10 of the Charter which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these matters or questions to the Members of the United Nations. Now, obviously, that reference does not appear to have been intended to deal with the question at all whether there had been any transfer or assumption of functions; it merely pointed to an organ within the United Nations that would be competent to exercise the supervision if such supervision were a matter within the scope of the Charter. That question does not purport to be

answered by this last paragraph. The answer to that, if any, is to be found in the first three paragraphs, and that is therefore, on analysis, what appears to be the crucial portion of the reasoning—the first three of these four paragraphs.

Now, the first one sets out—I am reading back at page 136—that:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System." (*1950 Opinion*, p. 136.)

I pause there for a moment. What the Court is suggesting here is, in my submission, perfectly clear. It is that in this Mandate System the element of report and accountability to an international supervisory authority was regarded as a very important element, an element directed towards effective performance of the sacred trust of civilization. It was so considered by the authors of the Covenant; and later the authors of the Charter, when they devised the trusteeship system, had a similar contemplation. And, therefore, there arises this general probability that even after the disappearance of the supervisory organ provided for under the Mandate System there would be a contemplation of continuation of such a system of supervision. The Court refers, as I understand it, to the consideration of effectiveness as a consideration of general probability, bearing upon probable intent of the interested parties.

The Court continues to refer then to another general consideration which is that there is in existence, despite the disappearance of the League supervisory organ, an organ on the part of the United Nations which performs similar, though not identical, supervisory functions.

The Court said:

> "... It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions." (*1950 Opinion*, p. 136.)

The suggestion appears to be this: that because of the general probability that the interested parties would have intended to keep alive a system of supervision, and because of the existence now of an organ that would be capable of performing such supervisory functions, the probability is that the parties would have intended such supervision to be exercised by this new organ.

That, in my submission, is the only juridical interpretation that could be placed upon these general considerations, as the Court called them. It could not have been the intention of the Court to connote that because of the necessity or desirability of supervision, therefore the Court holds that that supervision must be kept alive. It cannot have

been the intention of the Court to signify that because there was an organ on the part of the United Nations capable of exercising the supervision, therefore the Court now holds that there is an obligation on the part of the Mandatory Power to submit to such supervision. Because, if that had been the intention of the Court, then what the Court would have been doing would not be interpreting the law but laying down the law, or legislating, and that is not a fair interpretation that could be placed upon this reasoning. The only juridical, or judicial interpretation, I submit, that can be placed upon it, is to read it as being indicative, as a matter of probability, of intent—probable intent on the part of the interested parties, with the aid of the consideration of effectiveness. Therefore, that is the reason why the Court itself referred to this reasoning as "these general considerations"—meaning thereby general considerations of probability tending towards an inference of tacit intent on the part of interested parties.

Read in this way, the "general considerations" could not have been regarded as being conclusive on the question of what the tacit intent of the parties must have been. They are mere general indications of probability tending one way. But before a final answer could be given to the question whether an inference of tacit agreement arose necessarily or not, it would be necessary to have recourse also to all other evidence bearing upon such intent on the part of the interested parties. And, therefore, the Court proceeded to have regard first of all to a consideration regarding probable intent on the part of the authors of the Charter in its reference to Article 80, paragraph 1, and thereafter it proceeded to give corresponding attention to probable intent on the part of the Members of the League at the time of the last resolution regarding mandates. And it is only after consideration of all this reasoning that the Court stated its conclusion at page 137:

> "For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it." (*1950 Opinion*, p. 137.)

When we come to analyze what the Court said in regard to Article 80, paragraph 1, we see that the Court refers to this clause "as it has been interpreted above". Now, the "above" interpretation refers back to pages 133 and 134 of the report where Article 80, paragraph 1, is first dealt with in this Opinion. The Court there stated this view of the continued existence of the substantive portion of the Mandate:

> "This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. It is true that this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse

> automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System." (*1950 Opinion*, pp. 133-134.)

So, Mr. President, in referring back then to this interpretation of Article 80, the Court evidently referred back to this portion as to what this provision "presupposed", and as to what the "obvious intention" was that was to be found underlying that provision. Because the Court —at pages 133 to 134—contrasted what the provision actually says with what the provision presupposed and what was the obvious intention in regard to that provision. And therefore again this reference in the reasoning at page 136 to 137, referring back to Article 80 as "interpreted above", is a reference, *not* to the express provisions of Article 80, but to a tacit underlying intent which the Court infers from it.

And that idea is further supported by the wording which the Court now employs at pages 136 to 137, where it says further:

> "... It purports to safeguard, not only the rights of States, but also the rights of peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ." (*1950 Opinion*, pp. 136-137.)

Therefore, Mr. President, again a clear reference to implication as to tacit underlying intent—"The purpose must have been"—and the argument is supported by the consideration of effectiveness.

Again, therefore, the reasoning appears to be that the indications, the probabilities, indicated an underlying intent which must have been to provide for continued international supervision in regard to mandatory administration.

And then, finally, in the reference to the Resolution of the Assembly of the League of Nations, we find the Court sets out the effect of the third and fourth paragraphs thereof, and then concludes with the words:

> "... This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations." (*1950 Opinion*, p. 137.)

Again therefore, the reference in the reasoning is not to something expressed in the resolution. The resolution nowhere expressly said anything about transfer of supervisory functions exercised by the League to the United Nations, or the taking over of such functions. But when the Court speaks of what the resolution "presupposes" in that regard, it must be an inference and an implication as to tacit underlying intent.

It was therefore, Mr. President, the totality of these factors—the general considerations of probability, the indications afforded to the Court by Article 80, paragraph 1, of the Charter, and the indications afforded to it by the last resolution on mandates by the League Assembly—the totality of those factors led the Court to an inference that there was an intention on the part of the interested parties to provide for an obligation of report and accountability regarding mandatory admin-

istration to the General Assembly of the League, reading in this last respect also, Article 10 of the United Nations Charter with that reasoning. And, because of that basis for the reasoning, it becomes extremely important to have regard to these factors of evidence, throwing light on the actual intentions of the interested parties, which were not before the Court in 1950. Because, clearly, where reasoning has to proceed by inference from evidential data, then the conclusion arrived at by inference from certain facts could be completely different from what it might be if those facts were amplified by others which were not known at the time when the first inference was drawn. The question—the logical question—as to whether an inference can or cannot be drawn alters as the evidential data, from which the inference is sought to be drawn, is altered.

We list at pages 345-346 (I) of our Preliminary Objections the particular factors which were not before the Court in 1950, and which in our submission are important now. The first one is not really important—I will not deal with it for the moment for I will revert to it later—but those which I wish to emphasize now as being of importance are the second, the third and the fourth. I would like to begin with the third one, which refers to the facts concerning the original proposal by China at the final session of the Assembly of the League of Nations, and the subsequent withdrawal thereof and substitution therefor of the resolution actually adopted.

Mr. President, those facts, in my submission, are of the utmost importance in this regard. When we look at the wording of that original proposal by China we find that it contains almost word for word a proposition, a proposal, for an express resolution to the effect—to the same effect—as the tacit intent the Court found to be presupposed by the actual resolution of the League. The Court stated that presupposition, which it considered to be involved in the League resolution, as follows at page 137: "This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations." The original Chinese draft, as we have it at page 253 (I) of the Preliminary Objections, proposed in its second leg that the Assembly should express the view that it considered "that the League functions as supervisory organ for mandated territories should be transferred to the United Nations after the dissolution of the League". Exactly the same thing. The Court considered that to be presupposed in the actual resolution adopted. The original proposal by China provided for an express resolution to that effect. But now that all the facts are known it is also known that that proposal by China could not be adopted because all the indications were that it could not receive the necessary support at the final meeting of the League. And when that proposal is now contrasted with the resolution actually adopted, considerably more light is thrown on the whole subject than was available to the Court before. Now, it becomes significant to see what was not contained in the actual resolution as adopted, and the significance appears from the statement by the representative of China on the introduction of the resolution as finally adopted. The implications flowing from that statement also become clear, to the effect that the understanding now was that there would be no further reporting and accounting; there would *not* be a transfer of functions of the League in respect of mandated territories not converted into trusteeship. And as soon as that becomes clear, then that throws considerable light in all other directions too. If that had been the understanding at the time of the

dissolution of the League, then surely it seems hardly likely that there could have been an opposite understanding some months earlier at San Francisco, when the Charter was adopted, when the delegates at the San Francisco Conference included the majority of the Members of the League.

Therefore, this factor, in itself, throws such light on what the actual intentions were, that it serves to counteract the considerations of general probability on which the Court relied and, with respect, correctly relied, in the absence of evidence to the contrary. But where this evidence to the contrary is supplied, then those general indications of probability lose their effect. This is particularly so when, in conjunction with the history regarding the original Chinese proposal, there is also taken into account the further fact which we mention in paragraph 2 at page 345 **(I)** of our Preliminary Objections, namely that the Court was not informed of the proposal by the Executive Committee of the Preparatory Commission of the United Nations for a Temporary Trusteeship Committee, or of the rejection of that proposal by the Preparatory Commission itself, or of the fact that nothing was then substituted as regards possible transfer to or assumption by the United Nations of functions regarding Mandated territories. That again shows, in the history of the formation of the United Nations and the putting into operation of the trusteeship system, that there was a proposal for some express regulation in this regard—for the taking over of supervisory functions in regard to Mandates not converted into trusteeship. And there again, the proposal was eventually rejected and not adopted, affording a further indication that it could not muster the necessary support. And as regards both sides—the contemplation both at the final meeting of the League Assembly, and the contemplation at the San Francisco Conference, and the first General Assembly of the United Nations at the time of its formation—considerable light is thrown on the intentions and the understanding then by the practice of States, to which I referred this morning. That is point (iv) which we list at page 346 **(I)** of our Preliminary Objections. This again affords very strong evidential material—in my submission virtually conclusive evidence—that there could not have been such a tacit understanding either on the part of League Members or on the part of Members of the United Nations, as was found by inference by the majority of the Court in 1950. Here we have direct evidence, very shortly after the actual event, bearing upon what the understanding and the intent of the parties in question actually was. All the evidence obtained from this source points in one direction and one direction only, and that is that about a quarter of the Members of the United Nations indicated that, according to their understanding, there was to be no supervision in respect of Mandatory administration where the Mandate had not been converted into trusteeship; and that, where they do express this under circumstances where one might expect contradiction, if there were other States that did not agree with that, we find no contradiction at all.

Therefore, we submit that, with this evidence specifically directed to the crucial portions of the reasoning by inference in 1950, if this evidence had been before the Court in 1950, the conclusion at which the majority arrived would not have been a possible conclusion for it, and in our submission it would then not have been recorded.

Mr. President, we deal at pages 346-350 **(I)** of our Preliminary Objections with extracts from the writings of several scholarly writers on inter-

national law who accorded a critical reception to the majority Opinion of 1950 on the point under discussion. I am not going to refer to those further now; they are on record. All I wish to say about it is this: I am not suggesting that the majority Opinion must be considered to be wrong merely because certain writers on international law suggested that it was, but what I do suggest is that when one has such a reaction from scholarly writers it is an indication that something could have been amiss somewhere. My submission as to what was amiss was the inadequate presentation of factual material to the Court in 1950. Some of the factual material may well have been known to some of these writers, as appears to have been indicated by their comments. Indeed, Mr. President, the only scholarly writer—apart from those who merely note the Court's decision without a discussion of its merit—the only writer who indicates support for the decision, as far as we have been able to ascertain, was the late Judge Lauterpacht in his writings. And he appears to have laboured under the misapprehension of fact which I mentioned this morning, namely that there had been some statement on the part of the South African Government by which it had acknowledged acceptance of an obligation to submit to supervision on the part of the United Nations, which, of course, was a complete misapprehension of the true facts of the situation.

I turn now to the Applicants' submissions in regard to Article 6 to see what they are, and to what extent they meet the case which I have just put to the Court. Their submissions in that regard appear to fall into three parts. The first is an introduction in their Observations at pages 428-429 (I) in which they suggest that we may have introduced this subject of Article 6 unnecessarily in these proceedings—in these Preliminary Objections. I have, in effect, disposed of that point; I dealt with it two days ago, I think, and I pointed out that if I could satisfy the Court that there was no succession as far as Article 6 was concerned, then that takes away all basis for the suggested succession in regard to Article 7 upon which the Applicants rely; and in that sense alone, the point is of the utmost importance. It is important also in other respects which I need not deal with now. Secondly, the Applicants urge a reaffirmation of the 1950 majority Opinion, and they deny the existence of good grounds for a full reconsideration of the matter. Thirdly, they have certain submissions on the merits of the question.

I will now deal first with what they say in regard to reaffirmation of the 1950 majority Opinion. They commence with their submissions in that regard at page 430 (I) of the Observations, and there they state that Respondent's contention is advanced "with little grace or merit". Grace is, I suppose Mr. President, a matter of taste essentially, and I think it is my French ancestors who first emphasized that that was not a matter which was really susceptible of logical disputation. But I need say nothing further about it except, seriously, that our contention involves no disrespect whatsoever for the Court. Indeed, I think I have emphasized that in the very way in which I have submitted to the Court that the real basis why I submit that there is a ground for deviation from what the Court found in 1950 in this respect, is that the facts were not fully and adequately presented to the Court then. As to the merit of the contention, I have dealt with that and I will deal with it further in answer to the Applicants' submissions. The Applicants continue at page 430 (I) of the Observations and say:

> "First, not one of the so-called 'new facts' has come into existence since 1950. Respondent had full opportunity to develop at length each and every one of them during the advisory proceedings." (*Observations*, p. 430 **(I)**.)

Now, Mr. President, as a statement of fact that is correct, except of course that we nowhere in our submissions refer to them as "new facts"; we don't call them that. They are not new in the sense that they came into existence after 1950 or that they could not have been presented in 1950. But that, in my submission, makes no difference whatsoever to the contention which we are advancing or to the merits of that contention. In municipal legal systems where there exists a principle of *res judicata*, provision is made by way of exception for reopening a case where new evidence is discovered, but then, in order to prevent abuse—in order to prevent this principle of *res judicata* from being frittered away altogether—that exception is safeguarded by qualifications. The qualifications are generally to the effect that the evidence sought to be raised with a view to reopening a case has to be new, either in the sense that it arose after the previous hearing, or in the sense that it could not with due diligence have been discovered at the stage of the previous hearing. One generally finds that in municipal legal systems qualifications of that kind are attached to this exception to the principle of *res judicata*. We find a similar situation in the procedure of this Court as set out in Article 61, paragraph 1, of the Statute. We find it there stated that:

> "An application for revision of a judgment [a judgment now in contrast with an advisory opinion] may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

So we have a similar safeguard there in protection of a similar principle of *res judicata*. But, Mr. President, in the case of a previous advisory opinion the principle of *res judicata* does not apply, and where the principle does not apply, there is no need for an exception to the principle, and where there is no need for an exception to the principle, there can be no occasion for a qualification to the exception. There is, indeed, no question as to the admissibility of argument or evidence on the same question that had been decided before in an advisory opinion. The sole question here is, what weight is to be assigned to the previous advisory opinion as a matter of authority. Clearly, if the factual material before the Court now was substantially the same as the factual material in 1950 when the Advisory Opinion was considered, then that alone would mean that the Advisory Opinion would be granted strong *prima facie* weight as being of precedential value as an authority. But when it is found that the question now before the Court is, although the same in form, very different in substance because of the presentation of new facts, then that must affect the value that could be given to the Advisory Opinion as a matter of precedent—as a matter of authority. That is the only logical proposition that is before the Court. We say it goes so far that the real question to be decided now by application of the law to the facts is in substance different from what it was in 1950, although the form of it still remains the same and, therefore, that the

Advisory Opinion has under these peculiar circumstances virtually no precedential weight in the present circumstances. That is our contention as we advance it, and we submit that that contention remains sound whatever the reason may have been why the facts were not presented to the Court in 1950 when they might well have been presented.

Mr. President, the Applicants proceed at page 430 (I) of their Observations as follows; they say:

> "Second, not one of the so-called 'crucial new facts' is in reality either new or crucial. Each one of them was before the Court in 1950, and, obviously, was not deemed crucial."

They proceed then, at pages 430-433 (I) of the Observations, to discuss this allegation with reference to each one of the four elements of fact which we listed in the Preliminary Objections at pages 345-346, and they conclude by repeating at page 433:

> "... These facts are neither new nor crucial. The Court considered them, as well as the other pertinent facts, and arrived at its conclusion. Respondent merely disagrees with that conclusion."

Now, Mr. President, that is not so: except for an explanation which I have to give in regard to the first one of the four points which we list, it is completely incorrect to say that any one of these factors on which we rely in fact was before the Court in 1950. In regard to the first one, I refer to our Preliminary Objections, page 345 (I); that was a reference to "Respondent's express reservation of 11th May, 1945, at the San Francisco Conference". The reference back is to pages 237-238 of the Preliminary Objections. It is a statement from which I read to the Court earlier in my argument—I read a portion at the top of page 238. The Court will observe that there is a footnote at page 238 which explains that in the written record of this statement, which we found in our records, from which the South African Representative, Dr. Smit, had read the statement, there was a further paragraph which was not to be found in the United Nations record. That paragraph reads as follows:

> "As stated in the Memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the Conference so that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new International Organization."

When we referred to something that was not before the Court in 1950, we intended that to relate only to this last paragraph, because the rest of the statement *was* before the Court. But that was not clear—the wording of our Preliminary Objections on this point was misleading as it was originally filed—the wording, that is, at page 345 (I). And that is why we made a correction before the Observations were filed. The correction was forwarded under cover of a letter dated 13 February 1962 in which we asked for a footnote to be inserted at page 133 to the effect that the text of the memorandum set out in Chapter II, Part A, paragraph 25 *supra*, was before the Court in 1950, but that the Court was not informed of the further paragraph set out in footnote 1 at page 238 *supra*. So that was all that was intended to be referred to, and as a matter of fact that statement is correct; the Court was not informed

of this further paragraph. But the whole question is really unimportant, and it is complicated further by the fact that although we had Dr. Smit's affirmation at the time when these Preliminary Objections were filed that he did in fact make that statement, Dr. Smit is unfortunately now deceased. The matter is for my purposes not important—that is why I said before I was not placing particular reliance on it because, in effect, there is implicit in the body of the statement, as it is in the text at pages 237-238 **(I)**, the same as is conveyed explicitly in this further paragraph in the footnote, and I am prepared to leave the matter at that.

But now, what is important, as I have submitted before—important for our purposes—are the second, the third and the fourth points listed in our Preliminary Objections at pages 345-346. In regard to the second point, namely:

> "The rejection by the Preparatory Commission of its Executive Committee's proposal for a Temporary Trusteeship Committee, without substitution of anything regarding possible transfer to, or assumption by, the United Nations of any 'functions under the Mandates System' "

in regard to that point the Applicants submit at page 431 **(I)** of the Observations that that was covered in substance by Respondent's Written Statement in 1950, and they refer then to an extract from the Written Statement. On analysis, Mr. President, one finds that that Statement referred only to the change of wording from "... a 'transfer' of functions..." to the wording of an "... 'assumption' by the United Nations of 'certain activities' previously exercised by the League". That is the crucial point, as far as I can make out, of the relevant passage in the Written Statement of 1950. Now, that is a point which I dealt with here too. It is a point which occurred in regard to the history of resolution XIV at the first part of the first session of the United Nations General Assembly. But the point regarding a proposal for a Temporary Trusteeship Committee with a function *inter alia* of investigating questions that might arise in regard to the transfer of functions regarding Mandates—that proposal was something quite different. That was something which occurred as part of the history of resolution XI relating to the putting into operation of the trusteeship system. That is a completely different point, and I don't know how it could be suggested that that was covered in substance by this different submission made in 1950 in the passage cited by the Applicants. The point on which we rely is that there was in this history of resolution XI a specific proposal for express provision in regard to arrangements for a possible transfer of functions, but that that express proposal could not muster sufficient support. So it is a point which is completely different from any of the others that have been submitted, and it was definitely not before the Court in 1950. Nor is the point covered by the further statements which the Applicants make here. They say—I am reading from the Observations at page 431 **(I)**:

> "The Court knew that the functions of the League in respect to mandates had not been expressly transferred to the United Nations and was aware of the fact that other transfers from the League to the United Nations had occurred. Neither of these facts was regarded as crucial."

But then again, neither of those facts is this particular fact on which we rely; this express proposal for a Temporary Trusteeship Committee for dealing with the question of transfer of functions which could not, apparently, muster sufficient support.

Then when we come to our point No. (iii) relating to the original Chinese proposal at the final session of the League Assembly. The Applicants state at the bottom of page 431 **(I)** of their Observations:

> "Respondent's statement concerning the original Chinese proposal is also not well taken. The facts concerning the Chinese proposal *were* before the Court in 1950, in the Written Statement of the United States of America."

And at page 432 **(I)** again—about the middle of the page—they state:

> "... As a matter of fact, the Court obviously did not find the facts concerning the Chinese proposal crucial, and had good reason therefor, as is demonstrated by the following section from a League Report which is quoted in the United States Written Statement..."

So, both these allegations—to the effect that the facts concerning the original Chinese proposal were before the Court in 1950—rest upon this extract from the Written Statement filed by the United States in 1950. The Written Statement cited the following from a report by an official of the League, and the wording of that report was:

> "Following upon a number of statements in plenary session of the Assembly with regard to the future of the territories now held under mandate, this subject was but briefly discussed by the First Committee. Attention was drawn by the delegate of China to the fact that, although the Charter of the United Nations—in particular by the establishment of an international trusteeship system—embodied principles corresponding to those of the mandate system, it made no provision for assumption by the United Nations of the League's functions under that system as such. The continued application to the mandated territories of the principles laid down in the Covenant of the League was a matter on which the Assembly would wish to be assured. The First Committee took note of the fact that all the Members of the League now administering mandated territories had expressed their intention to continue, notwithstanding the dissolution of the League, to administer these territories for the well-being and development of the peoples concerned in accordance with their obligations under the respective mandates, until other arrangements were agreed upon with the United Nations." (*Observations*, pp. 432-433 **(I)**.)

Now, Mr. President, how this extract could justify the statement that the facts concerning the original Chinese proposal were before the Court in 1950 I frankly don't understand. The reference is entirely to what was stated by the representative of China on the second occasion; that was on 12 April 1946 on the introduction of the agreed draft which eventually became the resolution of the League Assembly, as will be evident on reference to our Preliminary Objections, pages 253-254 **(I)** where we cite the extracts from the *Official Records* of the League. The Court will see that the reference to what occurred on 9 April when the original proposal was introduced, as recorded in the summary records of

the League, that is set out at page 253 (I). And then over the page, at page 254, there is recorded what was stated on 12 April on the introduction of the approved draft—of the agreed draft. And when the statement at page 254 is compared with this extract from the Written Statement of the United States in 1950, one will see that they accord almost exactly, and that the reference therefore was to what was stated on this later occasion. There was not a word of reference to the earlier proposal—either to the contents of the proposal or to what was stated in regard to that proposal on the earlier occasion. So that the whole of the point which we are now making, of the contrast which there is between what was eventually resolved and what was originally proposed—that was not before the Court at all, and I really see no justification whatever for this suggestion that the facts were in any way before the Court.

Mr. President, in regard still to this question of the original Chinese proposal, the Applicants further—at page 432 (I) of their Observations—state as follows:

> "The Chinese delegate to the Fourth Committee has placed Respondent's contention in its proper perspective."

The reference is to something which was stated in the Fourth Committee—I think it was in 1950—after the Advisory Opinion of the Court and after reference had been made there to the fact that certain of these facts had not been placed before the Court. Now, the citation is this, and Applicants say this places our contention in its proper perspective:

> "Mr. Liu (China) observed that the South African representative had stressed the draft resolution submitted to the League of Nations by the Chinese delegation; he feared that that representative's remarks might create a wrong impression in the Fourth Committee. The resolution finally adopted by the League did not, it was true, contain any specific provision for the transfer of supervisory functions, but neither did it forbid such transfer. In view of the importance of that point, he wondered why the South African Government had not considered it earlier but had waited until the advisory opinion of the Court had been discussed in the Fourth Committee. Dr. Steyn, who had represented his Government at the deliberations of the International Court of Justice, could have raised the question at the time.
>
> The Chinese delegation was therefore unable to accept the argument that the Court had been ignarent of the facts." (*Observations*, p. 432 (I).)

Mr. President, how that places the matter in perspective, I must say, I fail to understand. The only two statements in here are that there was no forbidding of transfer, the relevance of which I do not appreciate, and that Dr. Steyn could have raised the question at the time. But why this should lead to the conclusion that the Court was not ignorant of the facts I really do not understand. I do not understand the perspective that is said to flow from this. The fact remains that the facts regarding the original Chinese draft and its history were not placed before the Court, and none of this comment can do away with that basic fact.

Then, in regard to our fourth point, which we list at page 346 (I) of our Preliminary Objections under the heading of "Practice of States",

referring to the unanimous comments of the United Nations Special Committee on Palestine, and also the statements on behalf of certain other States as we deal with them in our Preliminary Objections, there the Applicants state in their Observations at page 433 **(I)**, the paragraph numbered (4) (I will not read the first portion, which is argumentative; I will deal with that later. I will proceed with the statement at the middle of that paragraph):

> "The facts concerning the Palestine Mandate were discussed by Sir Arnold McNair in his Separate Opinion, and, presumably, were known to his colleagues on the Court as well",

and the reference in the footnote is to Sir Arnold McNair's Opinion at page 157.

Mr. President, we find that what Sir Arnold McNair said was this:

> "Each Mandate has to be considered separately to ascertain the date and the mode of its termination. Take the case of Palestine. It is instructive to note that on November 29, 1947, the General Assembly of the United Nations adopted a resolution approving a plan of partition of Palestine, which was firmly based on the view that the Palestine Mandate still continued, as is evident from Articles 1 and 2 of Part A and Article 12 of Part B of the Plan." (*1950 Opinion*, p. 157.)

That is all that Sir Arnold McNair says in regard to Palestine. Now, how that could be relevant to our allegation that there was a report on Palestine which contained these very explicit statements indicating an understanding that there was no longer an obligation to report and account—how that could be affected I do not know. The reference by Sir Arnold McNair is not even to the report; he refers to the resolution which was based on the report, and he himself made no mention of that report at all. The Applicants go on and say:

> "The Report of the Special Committee on Palestine was also noted in the aforementioned Written Statement of the United States."

And they refer to page 134 of the statement in the *Pleadings and Documents* of 1950. Now, this is apparently the passage to which the reference is made:

> "In April 1947, the mandatory for Palestine requested the calling of a special session of the General Assembly to consider the question of the future government of Palestine and make recommendations concerning it. A special session was held, and a United Nations Special Committee on Palestine was appointed by the Assembly. This Committee reported to the second regular session of the Assembly in the fall of 1947, and on the basis of its report the General Assembly adopted resolution 109 (II) containing recommendations concerning the future of Palestine. The resolution recommended the establishment of a Jewish State, an Arab State, and an internationalized city of Jerusalem. On May 15, 1948, the State of Israel came into existence. Subsequently, it was admitted to membership in the United Nations. Negotiations are still in progress concerning the definitive arrangements to be made

with respect to Jerusalem and the portions of Palestine outside of Israeli territory."

So, the only statement there is that there was a resolution which was based on a report of this Committee, and there is no reference whatsoever to the contents of the report. We carefully went through the documentation of 1950, and we are quite satisfied that the report itself was *not* before the Court. The documentation shows that very clearly.

Therefore, Mr. President, the mere fact that Members of the Court may broadly have known the facts, as I suppose we all did, more or less, regarding the developments in Palestine—may even have known of the existence of a Committee, of the fact that the Committee had reported—that would not have made the Court aware of these particular portions of the report of the Committee on which we rely as being of special significance in this regard. So here again, the Applicants' suggestion that those statements were before the Court is not well founded. The Applicants do not deal at all with the further statements from debates in the United Nations by representatives of New Zealand, the Soviet Union and the United States, which I referred to this morning and which are set out in the Preliminary Objections at pages 336-337 **(I)**. They do not attempt to show that those statements were brought to the Court's attention. They do make other comments regarding our reliance now upon those statements, but I will deal with that later.

Because, Mr. President, of the fact that the Applicants suggest that these facts were before the Court, they do not deal, as a matter of merit, with our suggestion—with our submission—that those facts were of crucial importance. They simply say *(a)* the facts were before the Court and *(b)* because of the result they were obviously not deemed important by the Court, not deemed crucial. That is the way in which they put them. They put it specifically so at page 430 **(I)** where they say:

> "Each one of them was before the Court in 1950, and, obviously, was not deemed crucial."

Now, because the premise falls away—the suggestion that the facts were before the Court—therefore the basis for the further comment also falls away—the suggestion that the facts were obviously not deemed crucial. They could not have been deemed either crucial or not crucial when the Court was not aware of them. And the Applicants therefore present no reasoning at all to the Court in regard to the question whether knowledge of those facts could or could not have made a difference to the result arrived at by the Court in 1950. The Applicants have therefore failed to show that this is not a case in which we can legitimately, on grounds of real substance, ask the Court for a reconsideration *de novo* of the whole question and for a conclusion which would differ in that particular respect from that arrived at in 1950.

Mr. President, I come now to the Applicants' submissions on the merits of the question whether the obligation to report and account survived the dissolution of the League.

In this respect, the Applicant's argument largely takes the form of putting an interpretation upon the majority Opinion of 1950 and then supporting that opinion in the sense in which the Applicants interpret it. I can give a general indication of their submissions in that regard with reference to page 430 **(I)** of their Observations. I should perhaps, for context, start at the bottom of page 429. They say:

"Respondent admits that it is the Mandatory's duty to report and account which distinguishes a mandate from a self-limiting trust. Nevertheless, although it continues to administer the Territory, and avers that it has the legitimate right to do so, it contends that it has no duty to report and account. It is this illogical and inequitable proposition which the Court was unwilling to accept when it held that Respondent has the duty to report and account to the United Nations; when it did so, it did no more than apply the principle of giving effect to a basic international instrument which has as its purpose more than mere contractual relations between two entities, but which creates an international institution —a sacred trust. The Court employed the same type of legal reasoning that a municipal court would employ if it were faced by the contention of a trustee or *tuteur* that this duty to account had 'lapsed'."

Now, Mr. President, there are several things wrapped up in that passage. First of all there is a suggestion, not specifically stated but strongly made, that a right to administer the territory under a Mandate cannot be separated from a duty to report and account in respect of it to an international institution: in other words, a suggestion of inseverability as between the duty to report and account and the other aspects of the Mandate institution. I have already pointed out that as far as this suggestion is concerned it finds no support whatsoever from the Advisory Opinion of 1950. I may say, in passing, that the Applicants make that suggestion of inseverability more explicitly at page 443 **(I)** of their Observations, where they say:

"Although they..."

(the organs created after World War I)

"have been succeeded or replaced by other organs, the Court in its 1950 Advisory Opinion ruled that the Mandate survived, and consequently, that international supervision of the Respondent, as Mandatory, endures" (*Observations*, p. 443 **(I)**),

the suggestion being that as soon as we have survival of a Mandate, then there must necessarily also be international supervision of the Respondent as Mandatory: again, therefore, a very pertinent suggestion of inseverability in this respect.

I have given the Court the analysis, the proposition being quite obvious in the case of the two minority Opinions of Sir Arnold McNair and Judge Read that they regarded the two elements as severable— the element of report and accountability as against that of the other aspects of the Mandate--and also an analysis of the majority Opinion which clearly shows that that proceeded on the basis of severability and not inseverability.

The next aspect of this passage from the Observations which I have read, is the suggestion that the majority's finding in 1950 regarding survival of this obligation to report and account was based on the finding that the Mandate involved more than mere contractual relations between two entities and that it created an international institution—a sacred trust. But that again, Mr. President, seems at best a very questionable interpretation of the majority Opinion. That Opinion, as I

pointed out to the Court before, specifically distinguished between what it called "the essence of the sacred trust" on the one hand—"the substantive obligations to utilize its powers for the benefit and the advancement of the native inhabitants of the territory"—it distinguished very clearly between those obligations as set out in Articles 2 to 5 of the Mandate, and what it called the obligations which corresponded to securities for the performance of this trust, and it classified the obligation of report and accountability in this latter category. It was in regard to the former category, the survival of the substantive obligations involved in the sacred trust that the Court employed the reference to "something which involved more than mere contractual relations", that involved an international institution.

Mr. President, apart from that, let us for the moment assume for purposes of argument that we do regard this element of report and accountability as not merely a personal contractual obligation, but as something which could, in some sense or another, be said to be part of an international institution, part of a régime, part of a status—something objective. The mere fact that one could give that description to it—give it that name—does not mean that one can now deal with this element as if it were unrelated to an original question of intention between the parties altogether. It does not mean that if the parties which created this international institution—this status or régime, by an international agreement—if they intended that that obligation was to relate to specific supervisory machinery only, that the Court could now step in, merely because of this forming part of an objective status or institution, that the Court could now step in and substitute other supervisory machinery for that originally agreed upon by the parties. I do not know of any principle of law which would justify such a process of reasoning—a process of reasoning which leads to the result that as soon as one can give the name of a status or a régime to a certain arrangement, then intentions of the parties that created that thing no longer matter at all and the Court can step in and change the situation and bring about one that is not in accordance with what the parties originally intended. Even if we deal with something that could be described as a status, as a régime, as an objective institution, its content must still be determined with reference to the intentions of the parties that created it, the effective intent that went into its creation, its constitution. That is the only basis that I know of in law for determining what the content of such an institution could be.

Thirdly, Mr. President, there is in this passage, which I have read from the Observations, a suggestion that "the Court employed the same type of legal reasoning that a municipal court would employ if it were faced by the contention of a trustee or *tuteur* that his duty to account had lapsed". The analogy, in my submission, is completely unsound. When we deal with a case of a trustee, or *tuteur*, in municipal law what does his duty to account mean? His duty to account means something substantive. It means the duty which is the essence of his trust: to account to the beneficiaries under the trust, to render to them the interest on the capital, or the capital itself if and when he has to do so in terms of his trust; and if he fails to do so, to account to them, to excuse his failure for complying with his substantive obligation. That is what is meant by a *tuteur* or a trustee's duty to account in municipal law. It is something substantive. It is something part and parcel of his trust, and obviously

he cannot remain a *tuteur* or a trustee and have that duty to account lapse.

But, Mr. President, that is not the analogy with the Mandate as an international institution and with the Mandatory's duty to account. The Mandatory's duty is different. It would be analogous to a case where such a municipal *tuteur* or trustee is, in addition to his substantive duty to account to the beneficiaries, also specially required by contract to render, say, an annual account to some supervisory body, or some person in a supervisory position—where, for instance, there may be a Board of Executors, or a Board of Trustees, or a Master or an Orphanage chamber, or something of that kind—where there is special provision, then, in the trust arrangement, that apart from accounting substantively to the beneficiaries, there is also to be an annual report or account to such a supervisory institution.

Now if such a supervisory institution should cease to exist for any reason whatsoever, there is no reason that I can see why a municipal court would not find that a *tuteur* or trustee's duty to account in that sense had lapsed, when there is nothing in the trust arrangement that is substituted for that particular supervisory body or person to whom the duty to account related. There is nothing fancy or fantastic in the suggestion that such a duty to account could have lapsed. And that, I submit, is the true analogy between the case of a municipal trustee or *tuteur* and that of the situation relating to a duty to report and account under the Mandate system.

[Public hearing of 5 October 1962, morning]

Mr. President, I am still dealing with various arguments of the Applicants concerning the obligation of report and accountability. I pointed out yesterday, shortly before the adjournment, that most of these arguments take the form of putting an interpretation on the 1950 majority Opinion and then supporting the Opinion in the sense as interpreted. There is a further one of these at page 430 (I) of the Observations, to which I would like to refer—the second paragraph there:

> "The Court furthermore found, for purposes of confirmation, that the League of Nations relied on declarations of Mandatories, including Respondent, that they would continue to honor their obligations as mandatories..."

Now, Mr. President, I pointed out earlier in my argument, in dealing with the last session of the League Assembly, that those declarations by Mandatory Powers related only to obligations concerning administration in the territories themselves, and they included no intention whatsoever of reporting in regard to implementation of those obligations. That position is perfectly clear on the record, and the majority Opinion of 1950 did not indicate anything to the contrary. Therefore it is not clear at all what this argument of the Applicants is intended to mean—at any rate with reference to the question of report and accountability. The Applicants proceed to say the Court also found

> "... that neither the League nor the United Nations intended the obligations of mandatories to disappear without their being replaced by new obligations under trusteeship agreements". (*Observations*, p. 430 (I).)

There again it is difficult to see the relevance of this contention to the question of report and accountability because, in regard to that obligation of the Mandatories, no specific intent was required to make that *obligation disappear. It would disappear automatically upon dissolution* of the League, upon cessation of the existence of the supervisory organs specifically referred to in terms of that obligation. And it could only be kept in existence by some new arrangement, some fresh consent, whereby a new supervisory organ would be substituted for the old one for the purposes of the obligation. The Court in 1950 investigated the question whether there was such a new arrangement. The majority found there was, by implication, submission on the part of the Mandatory to a new supervisory authority—the General Assembly of the United Nations; the minority differed on that point. That was the question decided. So I do not follow how this interpretation could be put on that Opinion relative to the obligation to report and account, namely that what the Court found was that there was no intention that the obligation should disappear.

The main contention which the Applicants advance as the *ratio* for the 1950 decision on the question of report and accountability is what they call by various names: "automatic succession" is the expression they use at page 429 (**I**); they call it a "doctrine of succession" at that same page and also at page 443; and they call it a "principle of succession" in the Observations at page 445. In each case the suggestion is that the succession involved a substitution of the United Nations for the League as the supervisory organ to which the Mandatory was obliged to report and account. Now, one has to analyze what is exactly meant by these expressions—"automatic succession", "doctrine of succession" or "principle of succession". How is that brought into relation with the treaty relationships between the parties regarding the Mandate?

There are three possibilities. The first one, it seems, is that what the Applicants may have in mind is a succession in pursuance of something which was already provided for in the Mandate Agreement itself. If that Agreement should, for instance, have provided that "in the event of dissolution of the League of Nations, and in the event of there then being or coming into existence another international organization with the following characteristics"—and there would then have followed a description which would have fitted the United Nations—"then, in such an event, the Mandatory will be obliged to report to an appropriate organ of such an organization to its satisfaction"—if there had been a provision of that kind in the Mandate, then one could speak of an "automatic succession" at the time when the League was dissolved and when the United Nations was formed. The succession would be automatic in the sense that it would take place in pursuance of something provided for in the basic instrument. There is, of course, no such express provision in any of the Mandates—in any of the international agreements relating to the Mandates—but it may be, and it seems to be the position, that the Applicants rely on something tacit to that effect, something to be implied in the Mandate Agreements. That is the first possibility as to what they might mean by the expressions.

The second possibility is that they might refer to succession by reason of some tacit agreement or understanding arrived at during the period of transition, that is, at the time of establishment of the United Nations and of dissolution of the League. And the third possibility is

that they might have in mind a succession by reason of some principle of customary international law.

When one comes to analyze the arguments of the Applicants as they develop them—to the extent that they develop them—in the Observations, it would appear, Mr. President, that they mainly have in mind succession in the first sense to which I have referred; succession provided for in the Mandate Agreement itself, by implication. They don't put it in so many words, they don't state it exactly in that way, but that is, on analysis, what they appear to advance. They also refer to a passage in an article by Sir Gerald Fitzmaurice, and the manner in which they cite that appears to suggest that they might possibly have in mind succession by reason of some principle of international law; but that is not clear at all—I shall deal with that at a later stage. In the main it appears that they have in mind succession by reason of something provided for in the Mandate Agreement itself. We find the argument in that regard linked up with references to an "organized international community", and this argument is particularly developed at pages 442-443 and again at pages 443-446 of the Observations. They fortify the argument further with reference to scholarly authority and to the principle of effectiveness. The scholarly authority is cited in the Observations at pages 445-446, and the principle of effectiveness is referred to at pages 446 and again 481 of the Observations.

Now, Mr. President, if this line of argument is reduced to its bare essentials it appears to amount to this: that by Article 6 of the Mandate Agreement the Respondent undertook to report and account to what then was "the appropriate international institution" of "the organized international community"—those are the two expressions used by the Applicants in this contention—"the appropriate international institution" of "the organized international community". So that, although Article 6 expressly referred only "to the Council of the League", "to the satisfaction of the Council", what was really meant was the appropriate international institution of the organized international community. Secondly, that for purposes of the Mandate the United Nations has now replaced the League of Nations as the appropriate international institution, and that Respondent is therefore now obliged to report and account to the United Nations in the manner prescribed in Article 6. They advance further that such an interpretation of the situation involves a legitimate application of the principle of effectiveness. That appears to be the line of argument advanced. It seems, Mr. President, that the argument rests primarily on an implication to be read into Article 6 of the Mandate Agreement itself, because the Applicants themselves state expressly at page 481 (I) of the Observations as follows—they refer first to what they call a liberal interpretation employed by the Court in other cases, and then say in the last paragraph at page 481:

> "This mode of interpretation has already been accepted by the Court in interpreting Article 6 of the Mandate. In the Advisory Opinion the Court concluded that Respondent is required to submit to the supervision of the General Assembly of the United Nations and render annual reports thereto. In reaching its conclusion, the Court interpreted Article 6 of the Mandate so as to accomplish its purposes."

In other words, their contention appears to rest then on a manner of interpretation or construction of Article 6 of the Mandate Agreement. But naturally Article 6 contains nothing express to the effect contended for by the Applicants, and therefore the contention must rest on an implication which they seek to introduce into Article 6.

Mr. President, when I submitted, in the course of my argument to the Court, that Article 6 referred expressly only to a specific supervisory organ—the Council of the League—I was not asking the Court to interpret Article 6 restrictively or to indulge in a difficult process of interpretation in order to assign that meaning to Article 6. That is the only meaning which the words in Article 6 can bear, given their ordinary natural meaning in their context. It is simple enough:

> "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing..."

And the same in paragraph 7 of Article 22:

> "In every case of mandate, the Mandatory shall render to the Council an annual report..."

That is then the only meaning of the words interpreted in their ordinary and natural sense. And therefore, Mr. President, if the Applicants now seek to put another interpretation, as they call it, upon Article 6, by which Article 6 must be understood as referring to the appropriate organ for the time being of the organized international society, or words to that effect, then, Mr. President, that interpretation must in fact rest on implication. It is something which was not expressed—it was something that, if it is to be sound, must rest on one thing and one thing only, namely a tacit common agreement between the Parties which they did not express because they thought that that was "too clear".

In order to assist the Applicants' argument, that common intent would have had to involve this: that in the event of the League becoming dissolved and in the event of there then existing another international organization to which the description "organized international community" might be applicable, then the obligation would be to report and account to whatever organ of that new organization which could now be regarded as being appropriate in terms of its constitution. That seems to be the suggestion, and that would then have to be the effect, broadly speaking, of this tacit common intent on the part of the Parties to the Mandate Agreement if the Applicants' contention was to be regarded as sound. And so the question arises, on the principles which I attempted to state to the Court before, whether—having regard to the relevant evidential material concerning the Mandate Agreement, concerning Article 22 of the Covenant, concerning the constitution of the Mandate system, having regard to all that relevant evidential material—a necessary inference can be drawn to the effect that there was actually such mutual intent on the part of the Parties to the Mandate arrangements.

My submission is, Mr. President, that when regard is had to the circumstances surrounding the compromise agreement that went into Article 22 of the Covenant—the historical circumstances at the time which are well known to the Court and which are a matter of record—then it seems perfectly clear that there is no justification whatsoever for drawing such an inference as being anything approaching a *necessary*

inference. It may well be that some of the delegates to the Peace Conference would have liked to see such a result if possible, notably the President of the United States (President Wilson) and others who may have thought in the same direction as he did. They may have thought of that—they may or may not have had it in mind as an ideal. Whether they thought of it or not, if somebody had raised it, they might have considered it something that ought to be striven for as an ideal which ought to be achieved if possible. But one must not lose sight of the fact that what could be achieved could be done by agreement and by agreement alone, and there were other lines of thought at that same conference, as history very clearly shows.

The States who were in possession of the ex-German colonies and possessions, and who really wanted to annex or incorporate them into their own—for them the natural desire would have been—"If we do accept this Mandate system as a compromise, we want to make our obligations in regard thereto as little onerous as possible." That would be the natural tendency. Therefore the tendencies in this respect—on this particular point—would be in opposite directions, as indeed in many other aspects of this compromise arrangement which was eventually forged.

When these States were then eventually and with difficulty prevailed upon to accept the formula which was proposed as a compromise—an express formula which they then accepted—there is in my submission no justification whatsoever for an inference that what is now suggested by the Applicants, and which would have taken the matter a step further than to what they agreed expressly, that they would have assented to such a proposition. Indeed, Mr. President, all the indications are against even the probability that they would have assented to such a proposition. I have referred in that regard to the attitude expressed by the Prime Minister of Australia—we find it at page 219 of the Preliminary Objections—to the effect that his country really desired direct control (those were his words) and that this document, as handed in by the Prime Minister of Great Britain, represented for his country and for New Zealand the maximum of their concession. I have referred in that regard—the quotation is in the same portion of the Preliminary Objections—to what the South African Prime Minister stated, to the emphasis which he laid upon the people who constituted the conference and who would constitute the League of Nations, who understood the position and would not make it impossible for any Mandatory to govern the country. That was a factor which had induced him to agree. I have stressed in that regard the checks and the balances which went into a very carefully devised League supervisory system, and which were known to the Mandatories at the time when they agreed to this compromise solution.

In these circumstances then, Mr. President, if the officious bystander—as he has sometimes been called—referred to by Lord Justice Scrutton had come along and had asked the question, "Now, what will happen if the League of Nations is to be dissolved one day? What will happen to this obligation of report and accountability to the Council of the League?", can one seriously under those circumstances expect that there would have been one harmonious answer from the delegates at that conference? Could one expect that they would have said, "Obviously the answer is so clear that we did not trouble to say so"? I submit not, Mr. President. I submit that a factor of vital importance in that whole

situation is the existence in the Mandates system—in each of the Mandates—of a provision for amendment and modification of the terms of the Mandate, if and when that might be necessary, by agreement between the Mandatory and the Council of the League. The Applicants themselves state, at page 443 (I) of their Observations, towards the bottom of the page:

> "It was, of course, hoped and expected that the organs created after World War I to represent the international community would endure."

From that proposition certain consequences follow, which the Applicants overlook in their argument. Most important is this, that it would, in my submission, be quite unrealistic to attribute to the delegates at the Peace Conference any real contemplation of detailed effects which a possible later dissolution of the League of Nations might have upon the Mandate arrangements. If the question had been put to them they would say, "But that is something which we do not foresee at the moment. The circumstances, if that should happen, must determine what will take place." So that, if the bystander had put this question, "What will happen if the League is to be dissolved?", the natural answer would have been, "All will depend on the circumstances; there is machinery here by which we can alter the Mandate agreements to fit in with altered circumstances; we cannot foresee exactly what those circumstances will be, and time will have to tell. The arrangements and adjustments will have to be made as we go along. We cannot now have an agreement or an arrangement to cope with something which as yet is for all of us something from a practical point of view completely unforeseen." And therefore the circumstances here very forcibly emphasize the generalization to which I referred before by way of an extract from the judgment of Lord Justice McKinnon, in Broome *v.* Pardess. It is already on record—I merely repeat it for emphasis—where the learned Lord Justice said:

> "... Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject-matter, as to which there is an express provision, that there is also an implied provision or condition in the contract."

To take this analysis a stage further, Mr. President, suppose the bystander—the imaginary bystander—at this conference had pressed his point a bit further and had said: "What if the League—if and when it should be dissolved—should be replaced by another organization which could be described as the organized international community, and what if that organization should have an organ that might be appropriate, in terms of its constitution, for the purpose of exercising supervision over mandatory administration? Would this consent, which has now been given by mandatories to submit to the supervision of the Council of the League, to report and account to it, be regarded as applicable also to reporting and accounting to such an appropriate organ of such an imaginary later organization?" What would the natural reaction to that have been, Mr. President? I can imagine that a very natural and probable reaction might have been: "We have had enough trouble and difficulty about arriving at the agreement that has been arrived at; don't introduce further difficulties now; that is something which is not an immediate problem, it can safely be left for posterity. We will have to deal with the obstacle

when we come to it; there is provision for possible amendment", as I have said. That is one possible reaction, a very reasonable and very probable one.

Another probable reaction might have been, "We have not discussed that matter at all; let us discuss it now and see how far we come". In the event of such a discussion, what are the indications of probability as to what the attitude would have been, judging by what there is on the record in the annals of history as to the various attitudes at the conference?

Again, Mr. President, the probabilities are that the Mandatories—or at least some of them—would have said: "Now we know what it is that we are agreeing to by way of supervision on the part of the Council of the League; we know the implications of that type of supervision and we know, in other words, exactly what we are agreeing to. We are satisfied with those implications, we are prepared to accept them. This suggestion that is now being put to us about some type of organization which may replace the League, which may have an appropriate organ to exercise this supervision, is very vague. We cannot agree to, or assent to, a proposition of that kind without having more particulars, more details as to what it would involve, what the implications would be for us. We cannot, in fairness, be asked to agree to a proposition which is as vague as all that, without knowing how this organization would be constituted, how its organs would be composed, what the powers would be of the organs, what the voting procedure would be of the organs, and so forth." Indeed, that would have been the obvious attitude that the Mandatory Powers—or at least some of them—would have adopted. And, in those circumstances, Mr. President, I submit that nobody at that conference could have thought that there was any tacit agreement to the effect that the express provision in regard to supervision was intended to carry with it also a submission to a further vague type of supervision of this kind. There could not have been any impression in the minds of any of the delegates to the conference that that was the consensus of opinion and that everyone was prepared to agree to a proposition of that kind, although it had never been discussed.

That that is so, is specifically borne out by the subsequent conduct of the parties—of the States—who were represented at that Peace Conference initially and who can be regarded as the founders of the Mandate system. If there had been an understanding that Article 6 was to be interpreted or understood in the sense contended for by the Applicants, then surely there were occasions—particularly in 1945 and 1946 and shortly thereafter—when that understanding would very pertinently have been brought to light. Particularly if we look at the occasion on 12 April 1946, at the last session of the League Assembly, when the representative of China said that the functions of the League in that respect —in respect of Mandates—were not transferred automatically to the United Nations (I have given the quotation to the Court before) when he said that, then surely, if there had been a general tacit understanding of the kind contended for by the Applicants, somebody would have reacted: "But that is not right, you know! These functions of the League will be transferred automatically because the understanding has always been that this reporting and accounting is to be to the appropriate organ of the organized international community, and now there will be appropriate organs in the United Nations and, therefore, there will be an automatic

transfer." Surely if there had been such a general agreement—such a clear understanding, something which was not expressed because "it went without saying"—then there would have been some reaction of that kind at the League Assembly. But not a single delegate spoke to that effect, and indeed there was no disputation whatsoever of this statement by the Chinese representative that the functions of the League were not transferred automatically. Further, when the Chinese representative made the proposal that there should be express provision for a transfer of functions and for further reporting and accounting in the interregnum to which he had referred, one would have expected a reaction: "But that is unnecessary, it is already provided for by this general understanding which we all know, and to which we are all parties." And again there was no reaction of that kind.

When the expressed intentions of the Mandatory States at that last League Assembly indicated that there would be adherence to the obligations of the Mandates as regards *administration* in the territories, when in some cases nothing was said at all about reporting and accounting, and when in other respects there was a most pertinent indication—or intimation—that there would be no reporting and accounting in terms of the Mandate, then surely if there had been a general tacit understanding as contended for someone would have reacted to that effect and would have said: "Now what about that obligation, what about this understanding we have always had that your reporting and accounting would not only be to the Council of the League but to whatever organ of the organized international community could fairly thereafter be regarded as being a successor in that respect of the Council?" Nobody reacted to that effect, Mr. President.

When the questions arose in regard to Palestine (which were dealt with by that Eleven-Nation Committee), surely if there had been a general understanding of that kind the Committee could not unanimously have said: The Mandate has now become infructuous because there is no organ to which there can be reporting and accounting.

The question, Mr. President, remains; one of intentions—joint, common, mutual intentions—of the parties; and that question cannot be avoided by the use of labels, by speaking of an "automatic succession", by speaking of an "organized international community", or by using expressions of that kind. The basic enquiry remains one of intent. The factors to which I have referred afford the most practical means of testing that intention, and they *all* go to show that there is no foundation for the Applicants' argument.

If we take, for instance, the label "the organized international community", the argument may at first blush seem attractive because it has succeeded in finding a common name which can apply both to the League of Nations and to the United Nations, and by the use of this common name the argument seeks to bridge the gap. But, Mr. President, surely that is fallacious unless the matter is related to the intentions of the parties. I can give the Court an example. Suppose I make a contract with a transport contractor that he is to pick me up every morning by motorcar at an appointed time to take me to my place of work. One morning he turns up with an ox cart. Surely he cannot then say to me, "But our contract provided for a motorcar, which is a vehicle, and an ox cart is also a vehicle, and therefore I am performing my contract by bringing a vehicle and taking you in that, even though

you may be sopping wet when you arrive there because of the rain and even though you may be an hour late for your work." Surely, one cannot, merely by finding a common name for two things, now regard those two things as being the equivalent of one another for the purposes of a contract or agreement which refers to one of them.

If, for instance, some State had joined the League of Nations in 1930 and thus—according to the Applicants' description—became a Member of the "organized international community"; if that State had never taken any trouble to take the necessary steps to become a Member of the United Nations, surely that State could not at the present time claim that "I am a Member of the United Nations because the United Nations now is the 'organized international community' and I joined the 'organized international community' in 1930 when I joined the League".

That type of assimilation is a fallacious one unless it is related to the intentions—to the real intentions—of the parties. And the factors to which I have referred render it clear, in my submission, that the intentions of the parties agreeing specifically about supervision by the Council of the League cannot be understood as referring to the Council of the League as a concept of being an appropriate organ of an "organized international community" for the purpose of implying that if the Council should no longer exist one day and if there should be some other organization to which that label might apply, then that other organization is to be the supervisory authority.

Another ground on which Applicants' argument is sought to be based is the "principle of effectiveness". However, as the authorities on the subject render clear, this principle is merely to be used as a guide of a presumptive nature, indicative of common intent; it is to be used as an aid in arriving at a consideration of general probability regarding such intent. There can be no scope for its application where such intent, or the absence thereof, is clearly demonstrated by other considerations. *Williston on Contracts*, in Volume 3, Sec. 620, in referring to the use of this principle writes:

> "But the mere fact that parties have made an improvident bargain will not lead a Court to make unnatural implications or artificial interpretations. A Court will not under the guise of interpretation write a new contract for the parties."

And in *Halsbury's Laws of England* we find in Volume 8, pages 121 to 122, that

> "Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have."

In the present case, there is no justification for contending that the parties to the Mandate instrument must have intended the effect contended for by Applicants. As Lauterpacht, in his *Development of International Law by the International Court*, page 281, points out,

> "... absence of agreement could not properly be supplemented by an inference aiming at securing for the instrument in question a higher degree of effectiveness than was warranted by the intentions of the parties".

The overriding considerations, therefore must be such practical, reliable indications of common intent as exist, or—as in the present case—of the absence of such intent. A court's aim cannot be to attain the maximum of effectiveness, but only the maximum effectiveness consistent with the intentions of the parties. Indeed the 1950 majority Opinion did not invoke the principle of effectiveness in the way suggested by Applicants—i.e. with a view to reading an implication into Article 6 of the Mandate—but merely as an indication of probability regarding the intent of members of the League and of the United Nations at the time of transition.

In further support of their contention, Applicants refer to a statement of Judge Lauterpacht quoted at pages 445 (I) and 446 of the Observations, which reads as follows:

> "While as a rule the devolution of rights and competences is governed either by the constituent instruments of the organizations in question or by special agreements or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organizations in question."

It will be observed, Mr. President, that the statement is premised upon the "reasonably assumed intention of the parties". As Lauterpacht himself pointed out elsewhere the use of the principle of effectiveness is essentially a matter of good faith; it rests on an interpretation in all good faith of the intention of the parties. Where therefore as in the present case, practical considerations demonstrate the absence of such intent, that takes away all ground for such a reasonable assumption of intent and therefore precludes the succession contended for.

In the reasoning which led Judge Lauterpacht to the statement I have just read out to you, an analogy is drawn between the present situation and the "*cy-pres*" doctrine. This reasoning is set out at page 279 of the *Development of International Law by the International Court*, and the relevant passage reads as follows:

> "... Seldom was there a more compelling occasion for applying—as the Court did in fact—the *cy-près* doctrine which common law courts apply in order to render effective a general charitable intention in face of the impossibility of applying it according to the literal language of its author. In the case of the *Status of South-West Africa* the Court applied the essence, though not the terminology, of that doctrine—with full propriety, it is believed—to something less than the substance of the relevant provision; it applied it merely to the procedure of its execution. If, as the Court held unanimously, the institution of mandates constituted a status, then it was proper to apply to the matter before it the principle of succession in international organization—a principle which the present writer has stated ... with reference to the Opinion of the Court in the case concerning the *Status of South-West Africa*."

It seems clear, Mr. President, that in this case the very premise for the analogy is lacking, i.e. the basic overriding intent to which effect can be given despite failure of a particular method or machinery pre-

scribed for its implementation. To illustrate this point, may I be permitted to quote from *Halsbury's Laws of England* on the "*cy-pres*" principle, where we find on page 317 of Volume 4 (3rd edition):

"There can be no question of an application *cy-près* until it is clearly established that the mode specified by the donor cannot be carried into effect and that the donor had a general charitable intention."

And it goes on as follows, at pages 317 to 318:

"An application *cy-près* results from the exercise of the ordinary jurisdiction of the Court to administer a charitable trust of which the particular mode of application has not been defined by the donor. Where the donor has in fact prescribed a particular mode of application and that mode is incapable of being performed but the donor had a charitable intention which transcended the particular mode of application prescribed, the Court in the exercise of this jurisdiction can carry out the charitable intention as though the particular direction had not been expressed at all. Where, however, the particular mode of application prescribed by the donor was the essence of his intention (which may be shown by a condition or by particularity of language) and that mode is incapable of being performed, there is nothing left upon which the Court can found its jurisdiction, so that in such circumstances the Court has no power to direct any other charitable application in place of that which has failed."

Then, at page 324, we find the following passage on the same principle:

"Where the original foundation is capable of taking effect, the Court has no authority to vary it and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even in a manner which the Court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by lapse of time."

And finally, at page 325, we read:

"Again, where there is no general dedication of a fund to charity, or, in other words, where there is no overriding charitable intention, a gift for a particular purpose which cannot take effect cannot be applied *cy-près*."

As we have seen from the quotations given above, the basic overriding intent in cases where the "*cy-près*" principle can be resorted to is known as a "general charitable intent", i.e. when a donor or testator had an overriding intent to benefit charity, a specific body or institution having been designated by him to effect that overriding intent. However, where no such intent can be found, the doctrine cannot be applied. The matter is one of interpretation in each case. To come back to the analogy suggested in the passage I quoted from Judge Lauterpacht's book: if the "*cy-pres*" principle were to be applicable here, there would surely have to be an overriding intent on the part of the founders of the Mandate that Mandatories should be obliged to submit to *international* supervision, and that they should report and account to *an* organ, not necessarily the one expressly provided for, with a view to achieving the

overriding intent. But surely, Mr. President, if there is no such intent—the reporting and accountability obligations being specifically and exclusively related to a specific organ or institution—the very premise for the analogy falls away.

There are other respects in which the analogy with the "*cy-près*" principle fails. The doctrine is applied where, a donor or testator no longer alive and in control, the Court then of necessity has to step in, in view of the ensuing change of circumstances, to take such steps as are appropriate to effect what it considers to have been the overriding intent of the donor or testator. Now, where a contract, or an international agreement is concerned, where the parties to that agreement are still in existence, and where specific provisions are made in the instrument for effecting such modifications as may be required in view of altered circumstances, there is no such necessity for the Court to intervene.

Thirdly, in order to justify intervention by the Court, the original foundation must be incapable of taking effect—*in toto* and not merely as regards some aspect thereof. The reason for that is perfectly clear. The Court steps in because of necessity, when necessity requires it, in order to give effect to the basic intent and to prevent a lapse of the charitable bequest. But where there is no *necessity* for the Court to step in there is no *justification* for the Court to do so.

To give an example: Suppose there should be a bequest with a general charitable intent of providing for hospitalization of the poor in a particular district. In order to give effect to that intent, the donor or testator provides that there is to be, say, an annuity available to a particular hospital in the district, and one of the conditions or directions in regard to that bequest is that the director of the hospital shall annually report to say a hospital control board of the district in order to indicate what he had done with the money during that year. Now, Mr. President, if that particular hospital should cease to exist, then there would, on these principles, be an occasion for the Court to step in and apply the *cy-près* doctrine. But if merely the hospital control board should cease to exist so that there could no longer be reporting to the supervisory board, then that would merely alter one of the aspects of the bequest. The bequest itself—the original foundation—would still be capable of being given effect to. The hospital could carry on—it could still apply that annuity every year for the purpose for which it was intended—and there would therefore be no occasion, or no justification, for an application *cy-près* according to these principles to which I have referred.

That is really the position here. On the basis on which this case is being argued, one accepts that the basic idea, the sacred trust of civilization, remains, that the Mandate remains, involving for the Mandatory the substantive trust obligations which he undertook and which bind him to apply his rights and his powers in regard to the territory for the benefit and for the well-being and for the advancement of the inhabitants. That is the basic, underlying, original foundation—if we talk by way of anaogly with the *cy-près* doctrine—and that can still take effect. Therefore there is no justification for a Court to step in merely when an additional aspect attached to it, that of reporting and accounting to a supervisory authority, when that by itself becomes incapable of further performance. There would be no occasion and there would be no justification for the Court to perform any role of that kind.

For all these reasons, therefore, the analogy with the *cy-près* doctrine is not a sound one.

Mr. President, at page 445 (I) of the Observations the Applicants cite in support of their argument a passage from an article by Sir Gerald Fitzmaurice in the 1952 *British Year Book*. They state that:

> "... The rationale of the Court's approach is further confirmed by the carefully reasoned analyses of Sir Gerald Fitzmaurice and Sir Hersch Lauterpacht. Judge Fitzmaurice has pointed out...",

and then follows a passage which I am not going to read to the Court; it points to the similarity between State succession, where territory passes from one State to another, and the passing of a functional field from one organization to another.

Now, what I do want to point out is that the manner in which this passage is quoted, divorced from its context, is apt to lead to a misleading impression. The passage in fact in the *British Year Book*, 1952, at page 9, commences with the words "On the foregoing basis", which words were omitted at the beginning of the quotation; and they refer back to very important qualifications which go before, as I understand the article. On the previous page the learned author states, referring to the 1950 Opinion:

> "The Court found in effect that there had been an automatic or necessary devolution on to the United Nations of certain supervisory functions of the former League of Nations in regard to mandated territories, i.e. the right to receive, examine and observe upon reports on such territories, which the mandatory Powers were under a corresponding obligation to furnish to the League, and hence (in view of the devolution) were now under an obligation to furnish to the United Nations, in lieu of the League. Judges McNair and Read dissented from this view, because they were unable to agree that there had been any automatic or necessary devolution. In their opinion, any succession depended on definite arrangements to that effect having been made, and in the light of the relevant instruments they did not consider that this had been done."

The learned author proceeds:

> "It is not the present purpose to discuss which of these views was correct, particularly as the issue turned largely on the effect of particular instruments, and, to that extent, raised no point of *general* legal interest. It would appear, however, that the Court's findings [in other words the findings in the majority Opinion] constitute authority for at any rate the following two general propositions:
>
> (i) There *can* be an automatic devolution of functions from one international organization on to another in the event of the extinction of the former.
>
> (ii) There is a presumption that such a devolution occurs whenever the following conditions are fulfilled:
>
> *a.* a given organization becomes extinct, but another organization, intended generally to take its place comes or has come into being, having essentially the same purposes and principles, with a similar or analagous constitution and institutions, and carrying out broadly the same functions, in the same field;

b. the constitutive instrument of the new organization specifically authorizes or enables it to assume and carry out the functions in question."

All these qualifications are therefore to be borne in mind as being implicit in the words "On the foregoing basis" which introduce the next passage. Particularly I want to stress these, Mr. President: it was not the learned author's purpose to discuss whether the views of the majority or of the minority were correct in the 1950 proceedings; secondly the issue in 1950 turned very largely upon the effect of particular instruments and arrangements; and, finally, where the general propositions are stated on the basis of the views of the majority of the Court, even there the occurrence of a devolution under the circumstances mentioned can be put no higher than a presumption, which would apply under certain circumstances. And particularly, in a footnote relating to this element of presumption, the learned author again states:

"The matter is purposely not put higher than a presumption because it is clear that in arriving at the conclusion that the rights and functions in question had devolved on to the United Nations, the Court was not proceeding on a purely doctrinal basis but was influenced by certain factual considerations relative to the character of the Mandate for South-West Africa and the effect of certain particular instruments."

Therefore, it appears that, although the rationale of the Court's approach was *analyzed* by the learned author, it was certainly not *confirmed* by him.

The analysis, in my submission, supports the construction which I have, with respect and with submission, put upon that reasoning of the majority, in the sense that I have also submitted to the Court—that it was based on a general probability—a conception on the part of the majority that there would have been, as a matter of general probability, an intention on the part of the interested parties to keep alive this obligation to report and account in the form that the new organ, that would be appropriate for the purpose, would then for the purposes of their, contract, be regarded as the new supervisory organ. In other words, it proceeded on a general probability, one that would have to be viewed and to be weighed in the light of all other relevant, evidential considerations before one can come to a final conclusion as to whether there was in fact and in law in the particular case such a devolution or succession.

Therefore also, where I referred earlier to the three possible ways in which the Applicants' reference to a principle of succession could be understood, it is only when this particular passage to which I have just referred is read without regard to its context, it is only then that there could be some suggestion of a possible reference to succession in the sense of a principle of customary international law. I know of no authority that has ever suggested that there does exist such a principle of customary international law. It is not suggested in the article in question, as I have just emphasized. The article points out that the matter is one to be investigated with reference to the particular instruments, and I know of no authority which refers at all to the possibility of there existing a rule of customary international law to this effect.

Therefore in the final analysis, Mr. President, of the Applicants' arguments concerning succession, we find that they apparently do not contend for succession in pursuance of a principle of customary international law. They do *not* contend for succession in the sense of a tacit agreement at the time of transition between Members of the League on the one hand and Members of the United Nations on the other hand. Nowhere in their written Observations does one find any suggestion that they rely on succession in this latter sense. And therefore, in my submission, they do not attempt to support what was really the rationale of the majority Opinion in 1950. According to the analysis which I presented yesterday in my argument, that Opinion rested on a conclusion that during the time of transition there was such a tacit agreement or understanding providing for a succession, but that the Applicants do not attempt to support. And they do not attempt to controvert our analysis of the events during the transition period by which we show that all the indications there are against the existence of such a tacit agreement or understanding.

Their contention appears to rest entirely upon this interpretation, as they put it, which is to be given to Article 6 of the Mandate Agreement, and which, on analysis, as I have presented it to the Court, is to be understood really as resting on an implication to be read into that Article. And it is significant that, although they do that, they do not really advance any evidential material to the Court which must indicate that it would be a necessary inference to attribute such a common intent to the Parties. They do not attempt to controvert several major factors in our argument which tend to show that there could have been no such joint intent. They do not attempt to controvert our demonstration of the compromise history of Article 22, nor our analysis of the practical importance to the Mandatories of the fact that Article 6 related to specific League supervisory machinery only. They don't controvert that anywhere. They don't meet our argument as to the difference in substance and in form between supervision on the part of the League supervisory machinery and organs of the United Nations on the other hand.

And, finally, they do not meet our argument at all as to the significance to be attributed to the practice of States in this regard —to the statements of the nations involved in the report of the Commission on Palestine, to the other statements by the United States, New Zealand and the Soviet Union representatives during the course of debates—bearing upon what the real intent of the Parties in this regard must have been. They simply assert that that is the way in which Article 6 is to be read in order to make it effective. That, in our submission, in effect amounts to a suggestion that the instrument is to be given a higher degree of effectiveness than is warranted by the intentions of the Parties. It would, in effect, in my submission, amount to a revision of the instruments instead of interpreting them and it would give them an effect which would be contrary to their letter and their spirit.

Mr. President, when I dealt earlier with the Applicants' reply at page 433 (I) of their Observations to our argument concerning the practice of States, I mentioned then that there was a portion of that reply with which I would not deal at that stage. I would like to do so now. There are really two portions of that passage at page 433 which remain to be dealt with.

The first is a reference to Dr. Steyn's address to this Court on behalf of the Union of South Africa in 1950. The argument is this: Applicants say "The fact that Respondent finds the views of States expressed in a Report on Palestine to be *crucial* is surprising in the light of Respondent's argument before the Court in 1950", and they cite:

> "As a corollary, apparently, to the proposition that the mandatories and the Members of the League never intended the mandates to lapse, the Court's attention is also drawn, in the Written Statement of the United States, and also in the oral statements, to the fact that certain Members of the United Nations, and also the United Nations itself in certain resolutions, have accepted the continued existence of the mandates. Now that again, Mr. President, does not seem to take the matter any further. In fact, I find it difficult to understand why these views are referred to at all in this connection. At the most, they are mere expressions of opinion. These expressions of opinion cannot change the realities of the legal situation. They cannot make new law." (*Observations*, p. 433 **(I)**.)

But to appreciate that argument in its true light, one merely has to go on to read the very next sentence at page 280 of the *Pleadings, Oral Arguments, Documents* of 1950. The next sentence reads:

> "If in law the mandates lapsed upon the dissolution of the League, a contrary opinion, however often it may be expressed in the United Nations, could not alter the law, and revive the mandates."

There was no inconsistency whatsoever; Dr. Steyn's argument then was that a certain situation, the lapse of the Mandates, followed necessarily upon an event, namely the dissolution of the League. He said where that has happened, opinions expressed afterwards cannot alter that situation. Here we are dealing with an entirely different proposition; we are dealing with a proposition that there was, in regard to the question of succession or no succession regarding supervisory functions, a tacit agreement or understanding between the interested States. We refer to the practice of the States under various circumstances, the attitudes they adopted very shortly after the period of this suggested tacit agreement, when that tacit agreement would have become an important matter. And we submit that the views which they then expressed in that regard must be regarded as of very great evidential weight.

There is another passage at page 433 **(I)** of the Observations which remains to be dealt with, where the Applicants state:

> "Further, if the views of States are now to be considered relevant, due weight will undoubtedly be accorded to the views of the overwhelming number of United Nations Members, which have repeatedly taken the position that Respondent as Mandatory is accountable to the United Nations."

Now in support, in a footnote (No. 5), the Applicants state: "See, for example...", and they mention three United Nations General Assembly resolutions. The Court will note that the dates are 13 December 1950, the next one is 1952 and the third one is 1953. When those resolutions are referred to one finds that they were all, as the dates indicate, adopted

after the 1950 Advisory Opinion, and they were all directed *inter alia* at acceptance of that Opinion by the United Nations and a practical course or policy to be adopted on the basis of that Opinion. That was the trend or the contents of those resolutions, and that was what these States who took part in them were voting for. They were not then giving an indication of their own views or their own understanding of the situation in regard to report and accountability. If one is to ascertain what their attitude was in *that* regard, one has to go back to the crucial years before the Court's Opinion was given, immediately after this question of South West Africa had begun to arise in the United Nations. And then one has to refer for that purpose to the very significant debates of 1947, 1948 and 1949 in this regard. If one does that, Mr. President, as I now intend to do in reply to this argument of the Applicants, one finds that very far from the views of the overwhelming number of United Nations Members having been as the Applicants allege, we find the contrary. We find overwhelmingly the understanding is indicated that there was no obligation to report and account, outside of a trusteeship agreement, in terms of a mandate agreement because of a tacit agreement or understanding to that effect.

For the purposes of presenting this argument to the Court, I would like to refer to certain extracts from speeches and statements in debates in the United Nations.

[Public hearing of 5 October 1962, afternoon]

Before reverting to the argument I would like to explain further that we have compiled an index of all statements made on South West Africa at the U.N., but that need not form part of the record at all. It could be a document in the files of the Court. It was purely for the convenience of Members of the Court, and for my learned friends, to enable a check to be made on whether we have made the extracts correctly, or whether the extracts ought, in some way, to be regarded as being amplified or qualified by other things said on other occasions. The index is as full as we could make it—we cannot guarantee that it is absolutely exhaustive.

Now, Mr. President, to revert to the argument. We wish to draw attention to the fact that in 1947, during the Second Session of the United Nations General Assembly, the representative of the Respondent on two occasions stated very explicitly that, in the view of his Government, the United Nations had no supervisory jurisdiction in respect of South West Africa. He said that first on the 27th September 1947 in the Fourth Committee. We quote the passage in our Preliminary Objections, at page 261 (**I**). The passage reads as follows:

> "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."

Over the page, we find a reference to a further statement on 1 November 1947 in the Plenary General Assembly—also by the representative of the Union—where he stated that:

> "The Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this territory, they will serve to keep the United Nations informed..." (*Preliminary Objections*, p. 262 **(I)**).

I am stressing that portion—*they "will be rendered [if accepted] on the basis that the United Nations has no supervisory jurisdiction in respect of this territory"*.

There were, at the time, 57 Members of the United Nations, 51 of whom had been original Members of the United Nations. 32 of those 51 States had also been Members of the League at the time of its dissolution, and 34 of them had been original Members of the League. Therefore, if there had been a tacit understanding—originating from the time of the League, either from the time when the Mandate system was created or from the transition period when the League was dissolved and the United Nations came into existence—to the effect that the Mandatory was now obliged to report and account to the United Nations, as formerly to the Council of the League, regarding compliance with its substantive obligations under the Mandate, then surely, after these two statements by the representative of South Africa (to which I have just referred) in 1947, very shortly after the transition, one would have expected some reaction to that. Someone would have got up and said: "But you are running contrary to this understanding which has always existed, something that was so clear that it went without saying." But what do we find, in fact, during this 1947 Session? We find, on analysis, that representatives of 41 States addressed the various organs of the United Nations on this question of South West Africa—the Fourth Committee, the Trusteeship Council and the General Assembly. The other 16 of the 57 Members at the time did not take part in the debate on this question. Not a single one of any of the States—any of the Members of the United Nations—alleged the existence of a tacit agreement or understanding of the kind which I have just mentioned. There were some of the 41 who took part in the debates who contended that there was an obligation to enter into a trusteeship agreement. There were some of them who contended for an obligation to submit technical information to the Secretary-General under Article 73 *(e)* of the Charter, which (as I have shown) is a different obligation from reporting and accounting under the Mandate. Some of them contended that the Respondent (the Union of South Africa) had committed itself to the United Nations by the temporary rendering of reports in terms of the undertaking to which the two statements I have just read refer. They had, apparently, misunderstood the conditions under which that submission of information had been made right from the start. Some of the States contended that the Mandate had lapsed altogether, and some of them stated no clear attitude on the legal side of the situation.

They contended for what they called "political and moral duties and obligations" but they did not deal specifically with the legal side.

These are various types of attitudes adopted on the question. But, I repeat, not a single one of them alleged a tacit agreement or understanding which would render the Respondent liable to submit to supervision by the United Nations in the manner in which it had reported and accounted and submitted to the supervision of the Council of the League.

In addition to arguments stated on other aspects of the matter, one finds that at least 14 of the 41 States who took part in the debate, acknowledged—either expressly or by very clear implication—that, in the absence of a trusteeship agreement, the United Nations would have no supervisory powers in respect of South West Africa. (I say at least 14 for we made this classification and in some cases it is very difficult to decide whether the attitude of a State is to be classified on one side of the line or the other. We tried to be as conservative as possible and where there was the least doubt we classified a State's attitude as being non-committal on the point, rather than as being in our favour in this particular respect. But of those 14, we suggest (even though there may, in other cases, be difference of opinion) that they, either expressly, or by clear implication, indicated the attitude that outside of a trusteeship agreement there would be no supervisory powers on the part of the United Nations in respect of South West Africa. These States were: Australia, China, Colombia, Cuba, France, India, Iraq, the Netherlands, New Zealand, Pakistan, the Philippine Republic, the Soviet Union, the United States of America and Uruguay.

I would like to give examples now of the types of statements made in this regard by the States which I have mentioned, and to give the references where their statements are to be found. I would classify the statements of the following nations as being very explicit on the point: that of the United States, that of the Netherlands, that of Pakistan, of China, and of India. Now I would like to refer first to a statement on behalf of the United States of America, for a reason which will become obvious from the contents of that statement. It is to be found in the records of the Trusteeship Council for the 2nd Session, 1st Part, 15th Meeting, 12 December 1947, page 505—a statement by Mr. Gerig. The occasion was consideration of the information which the Union of South Africa had voluntarily submitted in terms of its undertaking. There appears to have been quite a debate on the question as to the manner in which this information was now to be dealt with in the Trusteeship Council. And this is what the representative of the United States said:

> "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exists."

It is a very significant statement because it is not only one made on behalf of the United States of America but it reflects on all the other members present in the Trusteeship Council on that particular afternoon, in that the representative of the United States said that that statement had been made and he did not hear any member object.

The statement on behalf of the Netherlands was almost equally explicit. I refer to the Records of Plenary Sessions of the General Assembly, 2nd Session, Volume I, 105th Plenary Meeting, 1st November, 1947, page 605. Mr. Kerncamp stated:

"The mandate system now does not operate. As there is no longer a supervisory authority, there is no longer a mandate system. The voluntary transmission of information, merely for the sake of information, by the Union of South Africa to the Trusteeship Council does not give the Council the same jurisdiction as the Permanent Commission on Mandates had...

We consider that the present situation constitutes a step backward, in so far as a territory once under international supervision is now under no superintendence."

We find on behalf of Pakistan equally explicit statements. The passage as a whole to which regard ought to be had is somewhat longer and I do not propose to read the whole of it to the Court. It is to be found in the *General Assembly Official Records, Second Session,* Volume I, 105th Plenary Meeting, 1st November 1947, at pages 618-619, a statement by Mr. Pirzada, commencing with the words "A simple comparison of the relevant Articles in Chapters XI and XII...", and I would like to refer to the whole passage to where it concludes with the words: "... second, supervisory control of an international body". For the sake of emphasis I refer now only to these two portions. The speaker was comparing the situation under the Mandate system, taking that system as being still in existence in regard to the case of South West Africa, and the situation, on the other hand, under the Trusteeship system, and he was mentioning various points of comparison. He stated:

"The second advantage which the Trusteeship System has over the ordinary administration under Chapter XI is that international supervision is provided under the International Trusteeship System, according to Article 75 of the Charter. As against that, under Chapter XI of the Charter, which relates to the administration of Non-Self-Governing Territories—to which class this Territory of South West Africa will have to belong if it is not brought under the Trusteeship System—there is no provision for international supervision, and the only supervision that exists takes the form of supplying information on non-political matters for the consideration of the United Nations: in other words, economic, social, and other matters..."

I skip somewhat and read the very last portion:

"Therefore, by refusing to place this Territory under the Trusteeship System, the Union of South Africa is going back on both principles recognized by the Covenant of the League of Nations: first, trusteeship of an international body; second, supervisory control of an international body." (P. 619.)

We find in the case of China two statements which, in our submission, strongly imply the same thing, both made in 1947. I will merely give their references now without reading them. The first one: *General Assembly, Official Records, Second Session, Fourth Committee,* 31st Meeting, 25th September 1947, page 6; and the second one, G.A.O.R., Second Session, Volume I, 105th Plenary Meeting of the General Assembly,

1st November, 1947, page 601. But any doubt there may be as to what was intended to be signified was removed by a statement by the same representative of China in 1948, *General Assembly, Third Session, Part I, Fourth Committee*, 76th Meeting, 9th November, 1948, page 296. There the statement was this:

> "It was true that, as no trusteeship agreement had been concluded for South West Africa, the United Nations could not intervene or exercise its power of supervision in regard to that territory. But paragraph 2 of Article 80 imposed an obligation to conclude such an agreement without delay."

An example, therefore, of an attitude that there was an obligation to enter into a trusteeship agreement but that, in the absence thereof, there was no power of supervision.

Then, India. India proposed a draft resolution of which paragraph 5 contained the following statement (*General Assembly, Second Session, Fourth Committee*, Annex 3 *h*, page 197):

> "*Whereas* the territory of South West Africa, though not self-governing, is at present outside the control and supervision of the United Nations."

The case of Australia I classified as being one of clear implication. Possibly I could put it stronger and put it on the basis of being express. We have three references—Fourth Committee of the General Assembly, Second Session, 39th Meeting, 8th October, 1947, page 58; and the next one is Plenary Meetings of the Second Session, Volume I, 104th Meeting, 1st November, 1947, page 588. On both occasions the effect of the statement was that the Union was under an obligation to treat the territory as being non-self-governing and therefore to submit information in terms of Chapter XI.

But now I wish to refer to the third extract, which is in the *Trusteeship Council, Second Session, First Part*, 15th Meeting, 12th December, 1947, page 477—a statement by Mr. Forsyth:

> "The reports on Trust Territories are submitted not merely to inform the Trusteeship Council but to enable the Trusteeship Council to exercise its main function, the supervision of administration. In the case of South West Africa which is not a Trust Territory, the Trusteeship Council does not have the function of supervising administration. The administration of South West Africa has been reserved by the Government of the Union of South Africa as its own concern and that Government, not having placed the territory under trusteeship, does not recognize the power of the Trusteeship Council to supervise its administration. There is, therefore, a fundamental difference between the purpose for which the report on South West Africa is submitted and the purpose for which reports on Trust Territories are submitted."

I have now referred to the statements on behalf of six of the fourteen States which I mentioned; I will not read from the statements on behalf of the other eight, I will merely indicate the references where their statements are to be found and our interpretation which we place on those statements.

In the case of Colombia, there are two statements to be found in the Official Records of the General Assembly's Second Session, namely the

105th Plenary Meeting, 1st November, 1947, page 602, and the 33rd Meeting of the Fourth Committee, 27th September, 1947, page 14. In the case of Iraq there are three to be found in the Official Records, namely, General Assembly, Second Session, Fourth Committee, 32nd Meeting, 26th September, 1947, page 10; 105th Plenary Meeting, 1st November, 1947, pages 621-622; and Trusteeship Council, Second Session, First Part, 15th Meeting, 12th December, 1947, page 482. In the case of the Soviet Union there is one in the Official Records of the General Assembly's Second Session, Volume I, 105th Plenary Meeting, 1st November, 1947, page 612; and in the case of Uruguay there are three references in the General Assembly's Official Records of the Second Session, namely: Fourth Committee, 33rd Meeting, 27th September, 1947, page 14; Fourth Committee, 40th Meeting, 9th October, 1947, page 60; 105th Plenary Meeting, Volume I, 1st November, 1947, page 615. In all these cases the attitude adopted was that the Mandate had lapsed altogether, so by clear implication, Mr. President, if the Mandate had lapsed altogether then there could not be a duty of reporting and accounting in terms of the Mandate.

Then the other States of the fourteen that I have mentioned, were France—Trusteeship Council, Second Session, First Part, 15th Meeting, 12th December, 1947, page 480; New Zealand—General Assembly, Second Session, Fourth Committee, 33rd Meeting, 27th September, 1947, page 17, and Second Session, Trusteeship Council, First, Part, 15th Meeting, 12th December, 1947, pages 478-479; Cuba, in whose case there are two in the Official Records of the General Assembly's Second Session, namely Fourth Commitee, 32nd Meeting, 26th September, 1947, page 10, and 39th Meeting, 8th October, 1947, page 55; and finally the Philippine Republic, for whom also there are two, namely, G.A.O.R. Second Session, Fourth Committee, 31st Meeting, 25th September, 1947, page 7, and 39th Meeting, 8th October, 1947, page 57. In all these cases the implication is clear because the statements are to the effect that in the absence of a trusteeship agreement the information in fact submitted by South Africa under its undertaking at that time could be examined for information purposes only—that was the trend of these various statements made. In the case of Cuba the representative went so far as to say that the information could not be examined at all, and the representative of the Philippine Republic contended that there was an obligation under Chapter XI to submit information which of course, as I have explained before, is a much less onerous obligation than to report and account in regard to compliance with substantive mandatory obligations.

Now of these fourteen States, Mr. President, four of them had also signed the Report on Palestine to which I referred before. They were Australia, India, the Netherlands and Uruguay, leaving seven additional signatories to that Report who had there, of course, indicated the same type of attitude. The other seven, then, were Canada, Czechoslovakia, Guatemala, Iran, Peru, Sweden and Yugoslavia. So, if we add these seven—because the Report was also in 1947—to the fourteen I have mentioned, we have twenty-one in all of the Members of the United Nations out of a total of fifty-seven who gave expression to this view in 1947, without a single contradiction. Sixteen of those twenty-one States had also been Founder Members of the League of Nations, and fifteen had been Members at the time of its dissolution. The record for 1947 is in this regard therefore a very significant one in my submission.

During 1948 and 1949 there were three additional States who by similar statements associated themselves with the others I have mentioned, so as to bring the total up from twenty-one to twenty-four. Those three were Costa Rica, Greece and the United Kingdom. Costa Rica's statement was to the effect that the Mandate had ceased to exist (G.A.O.R., Third Sess., Part I, Fourth Comm., 82nd Meeting, 17 Nov. 1948, p. 365). Then there was a statement by Greece to which I would like to refer. It was by Mr. Lely:

> "He recalled that at the third session of the General Assembly the representative of the Union of South Africa had stated that, when the Government of the Union of South Africa had given an assurance that it would send information on the Territory, it had made a specific reservation that the sending of such information would imply no commitment for the future and would not be indicative of accountability to the United Nations.
>
> [He] felt that that statement spoke for itself. The sending of information was a voluntary act on the part of the Union Government. If that was so, and he believed that it was, then the Union Government had not repudiated any previous assurance." (G.A.O.R., Fourth Sess., 269th Plenary Meeting, 6 Dec., 1949, p. 530.)

And then the third statement—that of the United Kingdom to the effect that:

> "It could not be said that the Government of the Union of South Africa had repudiated its previous assurance since it had complete liberty to decide whether or not to transmit information." (G.A.O.R., Fourth Sess., Fourth Comm., 135th Meeting, 24 Nov., 1949, p. 247.)

So the total, then, that had indicated this attitude grew to twenty-four; if we add the Union of South Africa itself, we find that twenty-five United Nations Members out of a total of fifty-six had expressed this attitude over the three years.

Whereas there had, in 1947, been no contradiction whatsoever, there came some measure of contradiction over the years 1948 and 1949, but, Mr. President, only from five States out of the very large numbers that participated in the debates. These were five that suggested that the United Nations had supervisory powers, or that Respondent had a duty to account, in respect of continued administration under the Mandate.

They were Belgium, Brazil, Cuba, India and Uruguay. The attitude of Belgium is to be found at *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 79th Meeting, 12th November, 1948, pages 325-326; of Brazil at *G.A., O.R., Fourth Sess., Fourth Comm.*, 132nd Meeting, 22nd November, 1949, pages 223-224 and *G.A., O.R., Fourth Sess., Fourth Comm.*, 135th Meeting, 24th November, 1949, page 244; of Cuba at *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 82nd Meeting, 17th November, 1948, page 356, and *G.A., O.R., Fourth Sess., Fourth Comm.*, 130th Meeting, 21st November, 1949, page 216; of India at *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 81st Meeting, 16th November, 1948, page 352; and of Uruguay at *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 78th Meeting, 11th November, 1948, pages 311-312.

Now, Mr. President, in the cases of Cuba, India and Uruguay, these statements were in conflict with earlier statements or attitudes which they had adopted. I have already indicated before that Cuba had, in 1947,

taken up the attitude that the Mandate had lapsed altogether, India had inserted that paragraph in its draft resolution to the effect that South West Africa was outside United Nations supervision and control, Uruguay had taken the attitude (G.A.,O.R., 2nd Sess., 4th Comm., 33rd Meeting, p. 14; 40th Meeting, p. 60, and Vol. I, 105th Plenary Meeting, p. 615) to the effect that the Mandate had lapsed altogether and that there was now only a matter of self-governing territories, *non-self-governing territories and territories under the trusteeship* system, and that there was no provision for any other—that was the attitude that Uruguay had taken up; so in these three cases the attitude adopted later, in either 1948 or 1949, was in conflict with an earlier attitude stated on the subject in 1947. In addition I might point out in the case of India the attitude was also in conflict with a submission which India made to this Court in 1950; that submission is to be found in the official record of the *Pleadings* in 1950 at page 148. The submission is to this effect:

> "It is respectfully submitted that the only respect in which the position has changed [as a result of the dissolution of the League] is that Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with. In other respects, the rights and obligations of the mandatory are exactly the same as they were before. The result is that the mandatory is not obliged to submit an annual report under Article 6 and that it cannot modify the terms of the Mandate at all because the procedure by which it could have modified the terms of the Mandate has ceased to be applicable."

That was the attitude again adopted by India before this Court in its formal submission in 1950. And in any event, Mr. President, in no case was the attitude of any one of these five States based upon a suggestion of a tacit agreement or understanding that had arisen on this subject during the transition period of 1945 or 1946. And in no case was the attitude based, explicitly at any rate, on an implication to be read into the Mandate Agreement itself; they may have had that in mind, but nobody ever said so. Briefly speaking, the bases which were in fact advanced were these: on behalf of Belgium the attitude was that Article 80 of the Charter protected the benefit of international supervision for the people of South West Africa; that is to be found at the reference place which I have given. In the case of Brazil there was just a broad statement to the effect that the Mandated territory "was under the supervision of the community of Nations, namely, the General Assembly", but no motivation given as to why that was so. In the case of Cuba the statement was that the United Nations had assumed the League's supervisory functions, for both Organizations represented the international *community. That was the motivation given for the statement that there* had been an assumption of League functions by the United Nations. In the case of India there was a broad suggestion that Article 80 of the Charter prevented the extinction of the right of the people of South West Africa to have reports submitted and scrutinized. In the case of Uruguay the reference was again to Article 80. It said that Article 80 imposed a duty to report to the international community, the United Nations having replaced the Council of the League as the organ or co-ordinating centre of that community; there we find an argument which approxi-

mates to that which the Applicants are now addressing to the Court. And we find, therefore, even in the case of these five, that the suggestions were somewhat vague and inconsistent in themselves, and contradictory. There was not a joint suggestion that there had been an understanding all the time to which South Africa was now running counter. The mere fact that they are so inconsistent, and that they are even so contradictory in certain respects, affords, in my submission, additional evidence of the absence of any clear understanding on the subject.

The fact that we find in the case of the three countries, Brazil, Cuba and Uruguay, a reference now to the organized international community —that appears to suggest that that was not an idea that had operated in the minds of the founders of the Mandate system way back in 1920, but that it was an idea that appears to have originated somewhere with a lawyer in 1948 or 1949, and was then put forward by these three countries, in the case of two of them in conflict with attitudes which they had adopted before—in the case of Cuba and in the case of Uruguay.

So, Mr. President, I submit that the total result of this survey is that, far from the overwhelming number of United Nations Members having taken the attitude that Respondent as Mandatory is accountable to the United Nations, as is submitted by the Applicants, the situation during the significant period which I have covered, shortly after the transition, may be said to have been overwhelmingly the opposite. I am not concerned with the question whether the actual legal attitudes adopted by the various States were correct in law or not; I am merely concerned with an evidential enquiry as to whether there was a general understanding of the kind suggested by the contention of the Applicants, and I submit that this evidence beyond any doubt refutes the existence of any such understanding and shows the existence of a very wide-spread contrary, or opposite, understanding.

Mr. President, I have come to the end of the portion of the argument dealing with the effect of the dissolution of the League on the Mandatory's obligation to report and account. In conclusion, I want to state that the effect of the argument is that that obligation, properly construed and interpreted—as a matter of wording and as a matter of probable intent of the parties—related only to specific League supervisory machinery and to nothing else; and because of the disappearance of that machinery, it became incapable of performance. All the suggestions of succession on the part of United Nations organs in that regard are, on analysis, and upon being tested in the light of the evidence as to the real intentions of the parties, found to be without foundation in law. I have in this regard stressed the importance of the facts which have now been placed before the Court, and which were not before the Court in 1950. Incidentally, this further analysis which I have just given of the attitudes of States at the United Nations during the period 1947 to 1949 on this very question of South West Africa, that too was not before the Court in 1950.

Where I have stressed that, I must not be taken to suggest that, had it not been for new facts or new information, it would not have been competent for this Court to depart from a conclusion earlier arrived at in an advisory opinion. It would certainly have been competent for the Court to do so, and I submit that if the Court were satisfied that justice required it to do that, it would not hesitate even in the absence of any new information. But I submit that in this case it would be much

easier for the Court to come to its own conclusion because of the fact that there is this new information which in substance makes the task of applying the law to the facts in this regard a different one from what it was in 1950.

I proceed to deal with the effect of the dissolution of the League upon the Mandate seen as a treaty or convention in force. I have dealt with the contractual origin and effect of the Mandate, and I have pointed out in that regard that it appears to be common cause that during the lifetime of the League, whatever its other effects may have been in addition, the Mandate did operate as a treaty or convention, and it would have been regarded as a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. There does not appear to be any dispute about that. What is an issue between the Parties is whether, despite the dissolution of the League, the Mandate Agreement is still in force as a treaty or convention within the meaning of Article 37. We say "no", the Applicants say "yes". The Applicants have to satisfy the Court that it is, with a view to justifying their contention with regard to jurisdiction.

Mr. President, our basic contentions in that regard are as follows. We submit that a treaty or convention is an international agreement made between subjects of international law and intended to create rights and obligations between such subjects of international law. Therefore, for a treaty or convention to have effective existence there must of necessity be at least two such parties possessed of international personality who enter into such agreement, and between whom the intended rights and obligations can operate as provisions of such an agreement. That appears to be perfectly trite—that one cannot have an agreement without at least two parties, and where one requires parties with international personality, as parties to a treaty or convention, there one must have at least two such parties to a treaty or convention in order to bring it into existence as an agreement, and in order to bring about contractual rights and obligations which can operate between them.

Likewise, we submit that, for continued operation as a treaty or convention, such an agreement requires the continuation in being of at least two parties, possessed of international personality, who can, as between themselves and by reason of the contractual *nexus* between them, claim observance of the agreed rights and performance of the agreed obligations. It is not sufficient only to have the two parties to make the agreement. They must continue to be parties to the agreement while it is in operation, otherwise it does not continue to operate as an agreement. There must be parties of which one can say to the other: "You have made a promise to me, you are under an obligation to me by reason of the contractual *nexus* between us; therefore I can enforce that promise against you; you cannot break it; you have promised to me that you are to fulfil it, and I now claim performance from you, because that contract is still in operation as an agreement between ourselves."

Consequently, when by extinction of parties to a treaty or convention the number of parties is reduced to one, then its continued contractual operation between parties becomes impossible in fact. In our submission the continued existence of the contractual rights and obligations as between international persons by reason of that treaty is then rendered impossible in law; there being only one party, the operation of contractual rights and obligations between international persons then becomes

impossible. It is impossible in fact, and the continued existence then of contractual rights and obligations, as distinct from other types of international rights and obligations, becomes impossible as a matter of law.

Now, Mr. President, such an extinction of parties so as to reduce their number to one could occur in various ways. They could be extinguished as States, or they could—although remaining in existence as States—cease to be parties to the particular agreement. There may be various reasons why they could so cease to be parties to a particular agreement. They could be released by voluntary agreement between the parties, or they could cease to be a party because of loss of an agreed qualification for being a party. The contract may require that in order to be, and in order to remain, a party to that contract, the particular State or international person must have a certain qualification, with the result that, upon loss of that qualification, that State or international person would, in pursuance of the very agreement itself, cease to be a party to the contract. And our submission is that that is what happened upon the dissolution of the League of Nations in regard to the Mandate in its aspect of operating as an international agreement, as a treaty or convention. We submit that all the parties to that agreement, other than the Mandatory itself, fell away—all the parties between whom it previously had contractual operation—and that for that reason there ceased to be a treaty or convention in force, quite irrespective of the question whether certain of the vested consequences of the Mandate Agreement could continue in existence for an independent reason, independently of its operation as an international agreement. In order to develop the crucial contention that all the parties other than the Mandatory fell away on the dissolution of the League, we have to deal with the question who those parties were and what was the intent of the parties to the Mandate Agreement as to qualifications in that regard; and that is the next subject to which I will pay attention.

Mr. President, we deal in the Preliminary Objections, at pages 300-305 **(I)**, very fully with the question of who are to be regarded as having been the parties to the Mandate Agreement. I have already made a submission to the Court that the function of the Principal Allied and Associated Powers in this regard was intended to be of a mere transitory nature, to bring the property into the trust, as it were, if I may use that analogy. The situation was very much analogous, in my submission, to that of a donor in respect of a trust. I may refer the Court to the view of authorities in regard to what that position is. I refer to an extract from a book which is available here in the Carnegie Library—it is *Underhill's Law Relating to Trusts and Trustees*, 11th edition, page 5. I will read a brief extract—the author states:

> "The late Sir Frederick Pollock, in his learned work on contracts, considers that a trust is, in its inception, a form of contract, but admits that the complex relations involved in a trust cannot be conveniently reduced to the ordinary elements of a contract and that there is sufficient justification for the course adopted by all English writers of treating trusts as a separate branch of law. There is, however, a radical distinction between contracts and trusts, namely that an executed trust, as distinct from a contract to create a trust, can only be enforced by a person for whose benefit it was made and can neither be enforced nor released by the person

who created it, unless he be also a beneficiary. On the other hand, as is shown later on in Article 8, a contract as a rule can be enforced or released only by the parties thereto. A trust, once finally created, is in fact the equitable equivalent of a Common Law gift and leaves no right in the creator thereof as such to enforce it."

The analogy, in my submission, applies in this case to the Principal Allied and Associated Powers. There was no contract which stipulated a role for them in the operation of the contract. They were in the same position as a donor who brings property into a trust. That trust was intended to operate, by broad analogy, as between the Mandatory and the inhabitants of the various territories, but also with certain contractual relations to apply in that regard as between the Mandatory and the League of Nations or the Members of the League. Because we find that the other party to this Mandate Agreement, apart from the Mandatory, was then the Council of the League; the Council of the League, acting in pursuance of paragraph 8 of Article 22 of the Covenant, which provided that "the degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council." That is where the Council got its authority to act as it did in representing the League or its Members in contracting with the Mandatory.

The next question, then, really is, who did the Council represent? Did it represent the League, to be seen as a legal *persona*, or was the League not to be regarded as a legal *persona*, and, if so, whom did the Council then represent? And if the League *was* a legal *persona*, did the Council represent the League only, or the Members of the League as well as the League itself?

We submit—and I don't need to elaborate on the submissions now because they are fully dealt with in the Preliminary Objections—that if the League was not to be viewed as a legal *persona*, then the Council, in agreeing with the Mandatory that it was to be a Mandatory on behalf of the League, would then, in reality, have been acting on behalf of the Members of the League associated in the League seen as a mere voluntary association of international persons and not as a legal *persona*. The expression itself "Mandatory on behalf of the League" would then not really be an exact one; it would really be an expression which is inapt and which ought to read "a Mandatory on behalf of the States associated in the League of Nations as Members thereof". Then the Members would have to be seen as the principals represented by the Council. And so the contractual *nexus* would then, in that event, have been between the Mandatory, on the one hand, and all the Members of the League, on the other hand, in respect of all the rights and obligations provided for in the Mandate Agreement.

There is, however, Mr. President, a very considerable body of authority for the proposition that the League was to be seen or viewed as a legal *persona*. We cite that authority in the Preliminary Objections at pages 308-310 (I), in our paragraph 15 of Chapter III. That is a proposition which I do not intend to argue fully or to analyze fully. It does not matter for the purposes of my argument whether the League be viewed as a legal *persona* or not. On either basis—and I argue the effect of the dissolution of the League on the Mandate as a treaty or convention, I argue it on both bases—the argument comes to one and the same

result, in my submission. But we do point out that the Applicants appear to accept the proposition that the League was to be seen as a legal *persona*, because at page 448 (I) of their Observations they refer to the League as a "corporate body" and they propound there a "carry-over" argument which was derived from provisions in municipal law regarding corporations. At page 448 (I) there is a section headed "Respondent's Contentions", and the last sentence of it reads:

> "If the League still existed as such, and a State withdrew from membership, there would still remain a corporate body and a membership thereof which could assure compliance with the Mandate."

And as I have said, the whole "carry-over" argument is based on the propositions which apply to corporate bodies.

Now, Mr. President, on the basis that the League was to be viewed as a legal *persona*, then the League itself would primarily have been the principal, the party represented by the Council in its contract or agreement with the Mandatory; and therefore, then, all the rights and the obligations provided for in the Mandate Agreement would primarily operate as between the Mandatory, on the one hand, and the League, seen as a legal *persona*, on the other hand. And on this basis there would be no ground for regarding the League Members also as parties or as the holders of legal interests under the Mandate as an agreement, except an inference which might be drawn, not from anything express or anything specifically said upon the point, but from certain of the provisions of that agreement. It will be recalled that the individual States Members of the League did not sign the Mandate Agreement, nor did they ratify it. If they became parties, or the holders of legal interests in regard thereto, it could only have been because of representation of themselves by the Council, or, possibly, by way of a stipulation for their benefit, seen as third parties, which they then accepted, and so, in a sense, rendered themselves parties to the Agreement.

The provisions from which one might possibly infer that Members of the League were also intended to be parties, or the holders of legal interests, are those which envisage actual benefits for them. One finds in the various agreements—not in the C Mandates, of course, but in the other mandates—one finds the provisions for an open door, intended to operate for the benefit of League Members. One finds even in the case of the C Mandates--the ones with which we are dealing—there is a provision providing for freedom of movement of the nationals of League Members who are missionaries and who want to exercise their calling in the Mandated territory. One finds in Article 7 that provision is made for the reference of disputes between another Member of the League and the Mandatory to the Permanent Court of International Justice. That in itself suggests that there was a view that Members of the League were to be regarded as having a legal interest or rights under this agreement which would then be justiciable in terms of Article 7. It is only inference from considerations of that kind, whereby one could say that on the basis that the League was to be viewed as a legal *persona*, the Members of the League were to some extent to be regarded as co-parties.

On that basis, then, the Mandate would be a contract primarily between the Mandatory and the League of Nations, but in addition also between the Mandatory and the Members of the League to the extent

that it operated for the benefit of League Members. To that extent, then, League Members would be co-parties with the League to this Mandate Agreement. In these two alternative senses, then, one can say that the parties to the Mandate Agreement, *vis-à-vis* the Mandatory, were the League and/or the Members of the League.

Which of those various alternatives is the correct one is, for the purposes of my argument, not important. The important point is that the circle was no wider than the League and its Members. There were no other or additional parties to this Mandate Agreement. And this analysis which I have just put to the Court is nowhere disputed by the Applicants in the Observations, as far as I could make out, and it appears to be accepted by them.

Only in one respect do they raise a query; they say that the legal interests of Members of the League are too narrowly conceived by the Respondent. They say that in the Observations at page 441 (I), and they proceed, and I quote, that such "interests" of League Members

> "... encompassed the achievement of the 'material and moral well-being and the social progress of the inhabitants' of the Mandated Territory as a 'sacred trust of civilization' ".

But, Mr. President, what they do not bear in mind when they make this submission is that our particular submissions—to which they refer at page 441 (I) of the Observations—refer to a statement which we had made that, *on the basis of the League being a legal persona*, Members of the League would have had a legal interest in such obligations *vis-à-vis* the Mandatory only in so far as the latter's obligations were intended to operate for the benefit of Members and their nationals. The Applicants leave out of account that that statement is made only on the basis that the League was a legal *persona*; and we say *on that basis* it seems very difficult to see how the Members of the League could also be said to be parties to this Agreement except by the process of inference, and that inference leads us no further than so far as their own interests, their material interests, might have been concerned.

On the basis, however, of the League not being regarded as a legal *persona*, then the Members of the League would have to be regarded as parties in respect of all the obligations of the Mandatory and therefore also in respect of the obligations which related specifically to the material and moral well-being and the social progress of the inhabitants.

The Applicants do not indicate, on the basis of the League being viewed as a legal *persona*, by what process the League Members could also have become parties to the Agreement to a wider extent than we have indicated, to a wider extent than flows from the inference which arises from the fact that certain provisions appear to be intended for their material benefit.

But however that might be, the Applicants do not suggest anywhere that the circle of parties could have been wider than the Mandatory, on the one hand, and the League and/or its Members, on the other hand. And that is an important basis for the further argument of this question.

[Public hearing of 8 October 1962, morning]

Le PRÉSIDENT: L'audience est ouverte. J'ai le regret d'annoncer que M. Koretsky, juge, lui aussi ne pourra pas assister à l'audience de ce matin pour raisons de santé.

La parole est à M. de Villiers pour la continuation de sa plaidoirie.

Mr. DE VILLIERS: Mr. President, before the adjournment on Friday, I was developing our argument regarding the effect of the dissolution of the League of Nations upon the Mandate as a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. I then gave reasons for our submission that, in order for a treaty or convention to be in force within the meaning of Article 37, there must at least be two parties, or sets of parties, with international personality, between whom it can operate as an international agreement, and that if the parties should be reduced to one, then it would cease to have operation as an international agreement and thus as a treaty or convention.

As regards application of that submission to the present case, I was dealing with the proposition that, for the Mandate seen as a treaty or convention during the lifetime of the League, the only parties were on the one hand the Mandatory, on the other hand the League and/or its Members. I dealt with the various alternative possibilities involved in the conception of the League and/or its Members as parties to the Mandate Agreement. I pointed out that in that respect there was in one instance a dispute between us and the Applicants concerning the scope of interests, or rights, of Members of the League on the basis of the League itself being regarded as a legal *persona*. I pointed out also that there appears to be no conflict on the proposition that the circle of parties was confined, as I have stated, to the Mandatory, on the one hand, and the League and/or its Members on the other.

Proceeding, then, from that point, Mr. President, I would like to remind the Court that in the Preliminary Objections, at pages 351-355 (I) (they are paragraphs 39-46 of our Third Chapter), there we analyze the provisions of the Covenant and of the Mandate instruments and we refer to relevant practice of States in confirmation of our submission that Members of the League were the only States that were intended to acquire contractual rights and interests from the Covenant and from the Mandate Agreements. And we refer there, amongst others, to the importance which was obviously attached in the Covenant to the aspect of reciprocity—reciprocity as between rights, interests, benefits which the provisions of the Covenant could confer upon States as Members of the League and, on the other hand, obligations imposed upon States as Members of the League by the provisions of the Covenant; the intent being obvious that the benefits or rights were not to be enjoyed by States who did not render themselves bound to the reciprocal obligations imposed by the Covenant, and that that was the basic reason or policy why rights conferred by the Covenant, and by the Mandates made in pursuance of the Covenant, would be confined to League Members.

We deal in detail there with provisions of the Covenant in substantiation of this argument, and I need not repeat the details which are before the Court in the Preliminary Objections.

We point out that the Mandates were made in pursuance of the Covenant and contain a projection of that same policy; that they indicate that they are Mandates "on behalf of the League" which conception itself confines the circle of interested parties to the League and possibly also its Members, and that in compromissory clauses in the various Mandates —like Article 7 in the case of our Mandate—the procedural facility for invoking jurisdiction of the Permanent Court was confined to Members of the League, thereby again indicating the contemplation that the

substantive rights intended to be conferred by the earlier provisions of the Agreement were intended to be confined to States that were Members of the League.

We point out also—and I would like to emphasize this—that the Council was acting in pursuance of Article 22, paragraph 8, of the Covenant, and that that was an authorization which was given only by League Members; and therefore in so far as it could be regarded as an authorization to act on behalf of States, as distinct from the League itself, it could not fairly be regarded—it could not be regarded at all—as being an authorization to act on behalf of States that were not Members of the League.

Now, again, these submissions, Mr. President, are not disputed by the Applicants and they appear to be common cause.

We proceed in the Preliminary Objections at pages 355-357 (I) (our paragraphs 47 and 48 of Chapter 3) with a further analysis of the provisions of the Covenant and of the Mandate instruments. We demonstrate there, with reference to both the natural meaning and the practical implications of those provisions, that, just as membership of the League was necessary in order to procure rights for States in regard to the Mandate system, just so membership of the League was a necessary qualification for the retention of such rights, and that the obvious intent was that upon loss of membership of the League the rights would no longer be vested in that particular State.

Again, Mr. President, we point out that as a general probability one would expect that to be so. If all the concern was shown to prevent States other than League Members from acquiring rights under the Mandate system, or under the Covenant generally, then one would naturally expect that there would be the same concern shown to ensure that after loss of membership by a particular State, rights would not be retained, otherwise the position would become anomalous.

We refer, for instance, to the large number of provisions in the Covenant in which the expression "Member of the League" occurs. We find it in provisions such as those providing that each Member shall have a vote in the Assembly, that four Members of the League, apart from the Principal Allied and Associated Powers, shall have representation on the Council. Now, in provisions of that kind it seems so obvious that the practical intent is that they apply while a State is a Member. The position would be completely anomalous if a State could, after ceasing to be a Member, still claim the benefit of provisions of that kind. We find that, on analysis, right throughout the Covenant: it is both a matter of natural meaning and a matter of practical implication as to what the intent was in those respects.

And again the situation in regard to the Mandates we find to be a projection of what is in the Covenant itself in that regard. If I may again refer to Article 22, paragraph 8, in so far as it authorized the Council to act on behalf of States, it did so clearly for the purpose of the association of those States in the League of Nations and for no other purpose.

Again as regards the conception of a "Mandate on behalf of the League", if the position was to be that States that ceased to be Members of the League would retain their rights under the Mandate system, then in the 1930s when a large number of States, ex-Members, were no longer Members of the League, one would have found a position of the Mandatory then having a Mandate not only on behalf of the League but also on

behalf of some fifteen States in addition. And we find that the situation would, in practice, be an anomalous one, if States that were no longer Members of the League could retain their rights as against the Mandatory as parties to a Mandate Agreement. They could, for instance, insist on demilitarization in accordance with the provisions of the Mandate and at the same time commit flagrant breaches of their own obligations in that regard under the Covenant. They could insist on open-door facilities in the Mandates in which that applied, while at the same time not complying with their obligations under the Covenant as regards freedom of transit and movement and so forth.

Clearly, then, the situation there envisaged also was that upon loss of membership of the League, for the practical reasons I have mentioned and because of all these indications of intent, such a State would lose the rights, the legal interests it previously had under the Mandate *vis-à-vis* the Mandatory.

And again, Mr. President, we find that this proposition does not appear to be disputed by the Applicants as far as the position is concerned during the lifetime of the League; because they go so far as to use this language at page 448 (I) of their Observations, in that middle section, headed "Respondent's Contentions", in the third sentence beginning with the word "Respondent" they state:

> "Respondent elaborates an argument in which a State which had withdrawn, or had been expelled from, the League attempted to exercise rights it had formerly possessed as a League Member."

I emphasize *"rights it had formerly possessed as a League Member"*, indicating clearly an acceptance of the proposition that those rights would no longer be possessed by such a State—that is, of course, dealing with the position during the lifetime of the League, whatever the position might be afterwards, which is the one that is being brought in issue by the Applicants.

Now, Mr. President, just as, during the lifetime of the League, any State which ceased to be a Member lost its status as a party to the Mandate contract, we submit that that consequence necessarily and logically followed for *all* Members of the League at the date of the League's dissolution, because, if the contractual intent was that contractual rights would be confined to the League Members, then as soon as there were no longer any League Members, in terms of that very same intent, there would no longer be contracting parties. The logical consequence, further, of this result would be that the Mandate would cease to operate as an international agreement, whatever vested consequences of that agreement might still remain in existence and in operation.

The Applicants do not deal directly with this submission, as to the necessary and logical consequence of the situation as in the League's lifetime upon the situation that resulted from dissolution of the League. The Court will recall that in regard to a similar problem which arises, particularly as regards Articles 6 and 7, the Applicants advance submissions as to "succession" and as to "carry-over". They do not advance similar submissions here. The effect of—shall we say—a "succession" argument, as applied to the whole situation of the Mandate as a treaty or convention in force, would really be that, whereas the original contracting parties were the League and/or its Members, *vis-à-vis*

the Mandatory, those contracting parties would now be the United Nations and/or its Members. Therefore, there would now be, in terms of the succession, a substitution—not only of a supervisory authority for the purposes of Article 6, not only of States competent to invoke compulsory jurisdiction under Article 7, but also of the very parties to the Mandate Agreement. There would, as regards the parties with whom the Mandatory contracted, be a substitution of a completely new set for the previous set. That contention is not advanced by the Applicants—they rather attempt to meet our case in an indirect manner on this particular point.

They advance an argument, at pages 434-436 **(I)** of their Observations, of which the salient features appear to be this (I refer to certain portions of the Observations in regard thereto): they say that the Mandate *instrument* was—and indeed still is—a treaty or convention and that it defines Respondent's duties. We find that towards the middle of page 435 **(I)**—it is, I should say, about one-third down the page:

> "... Applicants respectfully reiterate the point that it is the Mandate instrument—a treaty or convention—which defines Respondent's duties."

It goes on to say:

> "It is to that instrument that the Court looked, holding that the terms of the Mandate are still in force, including Articles 6 and 7 thereof."

Then they go on (I skip a bit):

> "... the Mandate instrument, which created an international regime or a status, survived the dissolution of the League as a treaty or convention because, to repeat the words of Judge Lauterpacht, 'the essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected' ".

At the beginning of that paragraph the Applicants state:

> "Applicants have pointed out that the instant cases pertain to the duties of Respondent as set forth in the Mandate instrument, and that the Court in its Advisory Opinion found such duties in force."

This reasoning, if I understand it correctly, appears to mean this: "We have duties laid down in an instrument. At the time when the instrument laid them down the instrument was a treaty or convention in force. The Court has now found that those duties are still in force and they are still in force as defined in the instrument. Therefore, the instrument must still be in force and therefore it must still be in force as a treaty or convention." That appears to be the line of argument; and it is advanced (the Court will observe) without reference at all to the question of parties between whom the Mandate could be said to be in force as an international agreement. Our submission is that that argument of the Applicants breaks down, at its very premise, because its premise is really a play on words.

In our submission a treaty or convention is a legal transaction, an international agreement. That is the primary signification of that ex-

pression. But, because of the practice of embodying a contract—an agreement and also an international agreement—in a written instrument, the terms "treaty or convention" have acquired usage also as referring to such an instrument. To that extent, then, there is an ambiguity in the expression itself—"treaty or convention". But that ambiguity exists only when one has the expression *alone*, divorced from any context. As soon as one puts it into a context—as soon as one speaks of a treaty or convention *in force*—then surely in that context the expression could only refer to the legal transaction and not to the document which is, in essence, mere evidence of what the transaction is. It is not, in any true sense, a document that could be "in force"—it is the legal transaction recorded in the document that could be either in force or not "in force". Therefore, it could only be in a very loose sense (I know the language is sometimes used) that one could speak of an *instrument* as being "in operation", or "in force", or as having "continued validity", the *real* suggestion contained in such expressions being that the *transaction* recorded in that instrument is still in force as a legal transaction—as a legal act.

We have a similar situation in the sphere of private law—of municipal law—with regard to the use of the words "contract" and "agreement". Again the word "contract" and the word "agreement" refer primarily to the *transaction* and, when they are used in conjunction with the expression "in force" or "operative" (or anything of that kind), then quite clearly the reference is to the *transaction*. One could also say—and one does—with the same type of ambiguity that an instrument in which such a contract or agreement might be recorded is a "contract" or "agreement", although the more correct usage would be to speak of that instrument as the *deed*, as is the practice in English law, the deed which contains that transaction—records it—sets it out. But as soon as one speaks of the conception of a contract, or an agreement, as being *in force*—as being operative—then it becomes clear that one has a transaction in mind and not the deed or the document in which it might be recorded.

Confirmation for this submission, Mr. President, which I have just advanced, is found in this consideration: Suppose we have a treaty or convention recorded in an instrument, but, later, something happens which cancels that agreement, renders it inoperative—suppose there is a later treaty between the parties by which the previous one is expressly cancelled and annulled. Now the document in which that previous treaty had been recorded and set out might still be in existence. It need not necessarily be torn up because there has been a cancellation of the treaty, and there could be records of it; it might be printed in books (as we often find). One could then still—as a matter of language—refer to those documents (even copies thereof) as being "treaties" or "conventions". But one would never speak of them as being a "treaty or convention *in force*". The reason why one would not do that is because the transaction which they recorded is no longer in force: and, therefore, that must always be the determinative consideration when one raises the question whether a treaty or convention is in force. The determinative consideration is the transaction recorded—is *that* in force or not? And from that there might, or might not, follow a less precise usage of speaking of the instrument as either being in force or not being in force.

Mr. President, I have with respect employed the example of a previous treaty which may be cancelled expressly by a later treaty, with the result

that one would then no longer speak of the previous treaty as being a treaty or convention in force. That same result would, in my submission, follow even if there would, say in the new treaty, come into existence a new *causa* for the same obligations as in the previous treaty to come into force again, or to remain in force. Suppose the obligations, or some of them, as recorded in the earlier treaty should be repeated in substance or even precisely in the later treaty, but they now owe their existence not to the first treaty but the second one, and that is why they are now in force as treaty obligations. Then the mere fact that those obligations still exist in exactly the same form, with exactly the same content and in exactly the same wording as originally recorded in the cancelled treaty, that would still not result in a consequence whereby one could speak of the cancelled treaty as being in force. It, therefore, follows Mr. President, that it is not sufficient for the Applicants to point to certain of the duties of the Respondents as originally recorded in the Mandate instrument as being still in force, and then to say that the consequence follows that the Mandate must still be in force as a treaty or convention. The inquiry must centre on the *causa*, the reason for those obligations still being in force. If that reason is the continued operation of the original transaction namely, the Mandate as an agreement, then of course the Applicants' contention would be sound. But if it should be found that the *causa* or the reason is something else—is not continued operation of the original transaction, the agreement—but is something else which results in those obligations still being in force without the original contract or agreement still being in operation, then the Applicants' contention is not sound. It is for that reason that it becomes necessary to have regard to the distinction between duties as originally defined in the Mandate agreement continuing in force by reason of either continued operation of the Mandate as a treaty or convention, or alternatively, by reason of continued existence of the Mandate as an objective institution.

That distinction, Mr. President, is one to which I have referred several times, but I have not dealt with it in detail before. It is one which is not in truth advanced by us as a submission which we urge the Court to accept; it is really a distinction which was drawn by this Court in 1950 in the Advisory Opinion, in coming to the conclusion that the Mandate was still in operation. Broadly speaking, the contention then advanced to the Court on behalf of the Union of South Africa was that upon dissolution of the League, the Mandate lapsed *in toto*, there was nothing left of a Mandate. The Court's answer to that in effect was, as we understand the Opinions, that the Mandate involved something more than contractual relations only: it involved also for the territory an objective status or regime which could survive and exist independently of continued operation of the contractual arrangements from which it had resulted. That status or regime comprised, on the one hand for the Respondent, title, power to administer the territory as Mandatory, and on the other hand, substantive trust obligations as set out in Articles 2 to 5 of the Mandate instrument.

What we are doing in referring the Court now to that distinction is really to say that that answer which the Court gave in its Opinion in 1950 is accepted by us, for purposes of argument, to be correct, and that on that assumption that distinction becomes an important one. It becomes necessary then to have regard to its implications as regards

this question whether the Mandate can still be said to be in force as a treaty or convention.

I have now stated to the Court broadly how we understand and interpret the 1950 Opinions on this point. Just for sake of clarity, may I repeat our understanding is that what the Court indicated was that the Mandate really had a dual aspect; it had the aspect of operating as an international agreement, as a treaty or convention, but the aspect also of resulting in an objective institution, and that therefore the argument addressed to the Court to the effect that the Mandate as a whole necessarily lapsed because the parties thereto disappeared, that argument could not be sound because even if there should no longer be an international agreement, the Mandate was still in existence as something objective which could exist independently of the operation of an agreement. The Applicants, however, say that we have misunderstood the pertinency of the judicial analysis,—these are the terms they use at page 435 (I) of the Observations. They say—a little bit above the middle of that page:

> "The Court did not, as might be inferred from Respondent's ambiguous language, hold that only in an objective or 'real' sense did the Mandate survive. The Court found that the Mandate is an international regime, and Judge McNair found that it has acquired a 'real' or objective status. But the pertinency of this judicial analysis is lost on Respondent: the Mandate instrument which created an international regime or a status, survived the dissolution of the League as a treaty or convention because, to repeat the words of Judge Lauterpacht, 'the essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected'."

It will be noted immediately, Mr. President, that in support of their statement that Respondent has misunderstood the pertinency of the judicial analysis, the Applicants refer not to something which was said in the 1950 Opinions, they refer to an extract from what was written by the late Judge Lauterpacht. In effect, they merely concentrate on this use of language on his part where he said that "the essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or status, or the very survival of individual parties or persons affected". Now that language, with the greatest respect, Mr. President, in that context was somewhat loose. It did not matter for the purposes of the learned author that it was loose because he was not dealing with a possible distinction between the Mandate operating as a treaty or convention and operating objectively. What the learned author there implied, and that was his only point really, was that *the obligations*, the legal *rights and obligations* provided for in the instrument, were still in effect, that *their* validity continued and it was really *per consequentia*, that he then spoke of the "instrument" itself as being something of which the validity continued. But he did not use that language in relation to the question whether it could then be said that such an instrument was still in operation as a treaty or convention, without reference to the question of parties between whom it could operate as an international agreement. And therefore, because his language was not intended by him to be applied to such a situation, even that language affords no support for the Applicants' contention.

When one turns to the 1950 Opinions themselves, they, in my submission, afford no support for the contention of the Applicants but they bear out the interpretation which we are putting on them for the purposes of our contention.

Mr. President, for the purposes of the analysis of the 1950 Opinions on the point under discussion, I should like to commence with the separate Opinion of Sir Arnold McNair on this point, because the learned judge went into this distinction most fully and explicitly in that Opinion. I will from that revert to the majority Opinion, which did not deal with the point in the same measure of detail, but my submission will be that the indications are clear that the line of thought was the same.

I refer first to page 153 of the separate Opinion of Sir Arnold McNair. There the learned judge stated this proposition:

> "From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence."

Thus the concept of something born from international agreement by multipartite treaty, but something which, once it has been created *inter partes*, acquires a degree of acceptance beyond the confines of the contracting parties and therefore also of durability beyond the existence or operation of their contract.

He discusses this proposition with reference to other examples that have occurred and, at pages 154 to 155, he applies it to the case of the Mandates system established in pursuance of Article 22 of the Covenant. I read the last sentence at page 154—it follows on a discussion as to the coming into effect of Article 22:

> "In my opinion, the new régime established in pursuance of this 'principle' [the principle that the well-being forms a sacred trust of civilization] has more than a purely contractual basis, and the territories subjected to it are impressed with a special legal status, designed to last until modified in the manner indicated by Article 22."

Therefore, again, something which would have effect beyond the ordinary confines of a contractual relationship, more than a purely contractual basis—a special legal status resulting from it for the territories.

At page 156 there follows this significant passage, after setting out the contents of the Mandate for South West Africa. I'm reading just below the quotation from Article 7.

> "These obligations possess two distinct characters. The provisions of the Mandate are in part contractual, and in part 'dispositive' (upon which term see Westlake, *International Law* (2nd edit.); ii, pp. 60, 294). In English terminology, it is both a 'contract' and a 'conveyance', that is to say, a document which transfers or creates rights connected with property or possession. In addition to the personal rights and obligations referred to above, it also created certain 'real' rights and obligations."

Here we then find a very clear and explicit statement on the dual aspect of the Mandate to which I referred before; its effect as a contract *inter partes* plus the additional effect as being something of the nature of a conveyance, as being dispositive of something real, pertaining to ownership, to use, to possession, to title of property. And the line of thought is developed as follows:

> "Coupled with the effect of the assent of the Principal Allied and Associated Powers, in whose favour Germany renounced her rights and titles over South-West Africa and who are expressly described in the preamble of the Mandate as the proposers of the Mandate, the Mandate transferred to the Mandatory, or created and recognized in the hands of the Mandatory, certain rights of possession and government (administrative and legislative) which are valid *in rem*—*erga omnes*, that is, against the whole world, or at any rate against every State which was a Member of the League or in any other way recognized the Mandate; moreover, there are certain obligations binding every State that is responsible for the control of territory and available to other States." (*1950 Opinion*, p. 156.)

It looks, Mr. President, as if in this last portion of the sentence, a "the" may have been omitted in front of the word "territory". The French is "*du territoire*", and the equivalent in English would require the "the", which would also make better sense in the context. It looks as if that might have been omitted there.

In any event, the distinction suggested here is a clear one. The idea is apparently that in addition to operating as a contract or agreement *inter partes*, the Mandate and its consequences—things that went with it—had a dispositive effect regarding title to property and corresponding conditions, or burdens, resting upon that title. That is why the learned judge stressed the effect of the assent of the Principal Allied and Associated Powers, who had the power to dispose of the title to the particular territories. That demonstrated the fact that the Mandate had the effect of transferring or creating a right of possession and government, which would have an effect beyond the contracting parties, apparently based upon the *recognition* that would be given to that special type of status—that special type of title which is involved for a particular Mandatory. Through the Mandatory's acceptance of that title, which involved not only rights but also corresponding obligations, and by recognition by other States of that type of title and of the Mandatory's possession of that specific title in a particular case—through that process of recognition there came about an objective situation operating outside of, and independently of, a contractual relationship.

This conclusion is further rendered clear by the next passage at pages 156 to 157:

> "In short, the Mandate created a status for South-West Africa. This fact is important in assessing the effect of the dissolution of the League. This status—valid *in rem*—supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League."

In other words, here the learned judge very definitely foresees the possibility that the whole of the contractual relationship may have disappeared, and yet the Mandate would survive in the sense of this legal condition of the territory—this status and the title which it involves for the Mandatory, coupled with the corresponding obligations—in that sense there would be a survival of the Mandate.

Further, Mr. President, in support of this line of thought, and this interpretation which we put upon the Opinion, I refer to page 157 where the learned judge cited an extract from a judgment of Chief Justice Marshall of the United States on the point that when a right is once vested, although having had its birth from a treaty, the expiration of the treaty which originally conferred that right cannot affect the continued existence of the right. The right may be one that has now obtained an independent existence, independently of the treaty which gave birth to it. That treaty may fall away and yet the right might persist: again supporting the interpretation that what the learned judge had in mind was that the Mandate seen as a contract, an international agreement, might have disappeared altogether, and that yet the Mandate as an objective institution would still have an independent existence, independent from the continued operation of that international agreement to which it owed its original creation.

Before proceeding with an analysis of the majority Opinion, I would like to refer to Westlake, the work to which Sir Arnold McNair referred at page 156 of his Opinion in drawing the distinction between a contractual and a dispositive effect of the Mandate. The particular passage from Westlake throws more light on what was envisaged in that distinction. The learned author was dealing with the general principle that where territory is ceded by a treaty of transfer or cession, then under certain circumstances the treaties which had been entered into by the transferor State may cease to be of operation in the ceded territory, and also with the principle, closely related to it, that where a State may cease to exist through annexation by another State, then the treaties of the annexed territory cease to be of operation—that being a general principle which he had discussed before. Now the learned author proceeds to state:

> "There is a class of treaties called transitory or dispositive which may seem to be an exception to the rule that the treaties of the transferor or extinguished state cease to operate in the ceded or annexed territory, but which may as easily be represented as not being really an exception. These are treaties which dispose of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating the right of way over it in the grantee. Such are treaties of cession, by which the sovereignty in a territory is transferred by one state to another, and those by which a territory is subjected to a servitude or easement, as the treaties of 1815 by which northern Savoy was declared perpetually neutral, thus creating in it a servitude of neutrality in support of the neutrality of Switzerland. Documents of title of this class, whether in private or in international law, are called transitory, because their effect passes over *(transit)* into and forms a part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact,

without being obliged always to refer to the dealings which created it, as it would be necessary to refer to an ordinary contract every time that its performance had to be claimed in a fresh case. But the term [transitory] is a bad one, because the associations usually connected with the word 'transitory' cause it to suggest a fleeting character for documents of which the operation is really the most permanent, and the best term to use is 'dispositive'. Now a transferee or annexing state takes the territory as it stands, that is, subject to all the rights which have been impressed on it in favour of third parties by the treaties which have disposed about it; and by virtue of this possibility of looking only at the rights as they stand, without going behind them to the documents of title, dispositive treaties may be represented as not being an exception to the general rule." (Westlake, *International Law*. Part I, *Peace*, Second Edit., pp. 60-61.)

In other words, the line of reasoning is that where you have as a normal principle that the treaties of the, shall we now say, annexed territory, automatically fall away, that they cease to be of operation on annexation, we have this situation about dispositive treaties, that may have created something of the nature of a servitude or an easement, something which pertains to the use of the property—demilitarization, canal rights, something of that nature—that in those cases it may be possible to look not only at the treaties but also at the rights which have resulted from the treaties as having an objective existence. Therefore they do not really constitute an exception to the rule, because the treaties themselves cease to operate, there no longer being parties to those treaties. But the rights which have become vested have acquired an objective, an independent existence and for that reason the rights themselves continue to operate without the treaties still being in operation. That is apparently the type of distinction borne in mind and which was to be applied to the Mandate system.

I proceed to refer to the majority Opinion at page 131. There the majority of the Court describe the Mandate system as an "international regime" in the last paragraph.

> "With a view to giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League...",

and at page 132, the next page, there is a reference to the Mandate, just below the break in the print, about one-third down the page:

> "The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory..."

So the Mandate is there described as "this new international institution".

Further down the page the Court reasons in answer to the contention as then advanced on behalf of the Union Government—I think it may be best to read that portion in its context:

> "It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist.

> This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself." (*1950 Opinion*, p. 132.)

And then the Court proceeds to explain why that was a misconception:

> "The League was not, as alleged by that Government, a 'mandator' in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The 'Mandate' had only the name in common with the several notions of mandate in national law." (*1950 Opinion*, p. 132.)

I stress the next portion:

> "The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law." (*1950 Opinion*, p. 132.)

In other words, here we get the same idea that the Mandate had in mind something—an object—which would transcend or exceed contractual relations. The next passage proceeds to explain what that was:

> "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization." (*1950 Opinion*, p. 132.)

That, then, in this context, must be what the Court had in mind as the object which the founders of the institution contemplated, as something which would transcend and go beyond normal contractual relations.

> "It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa." (*1950 Opinion*, p. 132.)

And thus we come again to the conclusion that there is something which would owe its existence to recognition afforded to it and which could for that reason have a status, an existence, independent of, or at any rate transcending, contractual relationships. There seems to be, therefore, basically the same line of reasoning and of distinction as in the Opinion of Sir Arnold McNair, because what is to be borne in mind is the context of this reasoning; the context is an answer to the contention of the Union Government that the whole of the Mandate had lapsed because there was no longer a Mandator. And the Court answered it by saying that the institution that was created here had an object which transcended contractual relationships, and that was a *status* for the territory, *recognized* by the Members of the League of Nations, including the Union.

And therefore the same result follows: that what was contemplated by the Court was something which could exist independently of contractual relationships.

Explaining more particularly what this object involved—this object that would go beyond contractual relationships—we find the majority stating at page 133, the second paragraph from the end of the page:

"These obligations [referring to Articles 2-5] represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist." (*1950 Opinion*, p. 133.)

Here, then, we find what it was that the Court had in mind as something capable of this objective existence, as forming part and parcel of this international status of the territory recognized by the Members of the League, including the Union of South Africa.

Judge Read, in his Separate Opinion in 1950, indicated agreement with that elaboration, with the views of the majority on the question of the status for the territory which resulted from the Mandate arrangements. At page 164, he stated:

"It is sufficient to note that the international status of South-West Africa was that of a mandated territory."

And then at pages 165-166 he says:

"Bearing in mind the nature of the international status of South-West Africa under the Mandate 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."

Mr. President, the general views of the Members of the Court in 1950 on this question, therefore, appear to have been that quite independently of continued operation of a contractual relationship between the Mandatory and other Members of the League—in other words between the founders of the Mandate system—the Mandate could exist as an internationally recognized institution which involves for the territory a status thus recognized, and, for the Mandatory, a title or a power of administration, thus recognized. The title, according to this view, was seen as a qualified one—analogous to that of a trustee in municipal law—in the sense that it existed for the purpose of implementation of a sacred trust. And, just as in municipal law, it is possible to view the trust as being something of a burden which rests upon the title of the trustee, something which exists independently of a contract. This appears from the passage from Underhill, which I read, in which he rendered it clear that the donor, having made the necessary arrangements for the trust, normally falls out of the picture—in the absence of some very special arrangement. The completed trust then is no longer a contract. It is something analogous to a completed gift. There has already been a disposition of the property, a new title is now recognized by the law in the hands of the trustee and the obligations of the trustee *vis-à-vis* the beneficiaries under the trust are seen as something which operate as a qualification to his title. He has the title for the purpose of complying with those trust obligations and, in that sense, the obligations are much of the same nature as a real charge—an *onus reale*—on the trust property. That appears to be the type of institution which the Court had in mind in 1950, which could exist in the case of the Mandate, independently of the operation of a contract. It would be something analogous then to a municipal law trust, in the sense that here would be a special kind of

status for the territory—a special kind of title—involving rights and powers, on the one hand, but substantive obligations, on the other hand, pertaining to the manner in which this property was to be used, and the manner in which the title (the powers—the title to the property) was to be applied, namely for the benefit of the inhabitants (the beneficiaries) for the furtherance of the sacred trust. On this basis, I might point out that if this is a true appreciation of what the Court had in mind, then it might well be that, on that view of the situation, the conditions resting upon the Mandatory's title, as qualifications thereto, may be available as rights to a wider circle of States than those who had been parties to the Mandate arrangement, the idea being apparently that States *recognize* the objective existence of the Mandate—of this new type of status for a territory—and of a particular Mandatory's title thereto, and that, on the basis of that recognition, the Mandatory is not only qualified to exercise his rights but he is also obliged to comply with his duties which are coupled as part and parcel of his rights to the territory. That would seem to be the contemplation, and that would seem then to be the distinction which was drawn between continued operation of the Mandate as a treaty or convention, as an international agreement, and continued existence as an objective or a real institution.

That is why, Mr. President, I wish to emphasize that it is not for me to satisfy the Court that there is, or is not, a continued existence, as an objective international institution, of this Mandate. It does not matter at all for my purposes whether or not there is such a thing. On the assumption that there should be no Mandate at all, then there could be no jurisdiction of the kind which the Applicants seek to found, jurisdiction being part and parcel of a Mandate alleged to be in existence and sought to be exercised for the very purpose of performance of that Mandate. Therefore, an assumption of that kind does not hurt me, it hurts the Applicants. Again, the purpose of my argument has been to demonstrate that an opposite assumption—an assumption of continued operation of the Mandate of the nature that the Court envisaged in 1950, namely as an objective institution—does not hurt my argument either, because that would envisage a *causa* for continued operation of the Mandate which would be completely independent of continued operation of a contract. Therefore, my contention that the Mandate ceased to be in force as a treaty or convention, is not affected at all by acceptance—assumption for purposes of argument—of the proposition that the Mandate continued in operation in the objective sense. That is so in as far as concerns the Mandate seen as *the title of the Mandatory, the status of the territory*, and the objective trust obligations contained in Articles 2-5 of the Mandate.

Different considerations apply to Articles 6 and 7. I have pointed out before that, in regard to Article 6, it would be difficult to apply the analogy of a real charge—of something which affects the possession or the use of property. It seems to be more personal in its nature. That is the more so in regard to Article 7, providing for compulsory jurisdiction of a court. That is really a matter providing for adjudication of disputes, and it could hardly be said to be something directly pertaining to the use that can be made of property and, in that sense, to fall in the analogy of a real charge or an obligation of a dispositive nature. Apart from that, Article 7 requires parties to invoke it, and therefore if Article 7 should still be in operation—if there is to be a finding that Article 7 is still in operation—

then that finding would imply that there would be parties who could bring it into operation and, because of the requirements of Article 37 of the Statute of the Court, that operation would have to be based on a treaty or convention. I must therefore admit that in so far as the Court found in 1950 that Article 7 is still in force, that finding did seem to imply that it was still in force as a treaty or convention. Therefore I am prepared to accept that, as far as Articles 6 and 7 are concerned, what I am contending in respect of those Articles is, in effect, in conflict with the opinion, the conclusion arrived at by the Court in its majority Opinion in 1950. But that does not apply as far as Articles 2-5 are concerned. The Court did not in any way indicate, as far as Articles 2-5 were concerned, whether it considered that, in addition to their objective existence as part of the sacred trust, there could still be said to be a treaty or convention in force in regard to them.

Therefore, in all respects except Articles 6 and 7, the contention which I have now advanced to the Court is not in conflict with anything found in 1950. In so far as variance is involved regarding Article 6, I have dealt with the situation in that regard. I will deal particularly with Article 7 in a separate portion of my argument which will follow directly on this one. All I want to point out at the moment is that if the principles and the application which I have advanced to the Court under this portion of the argument should be accepted as sound, if, in addition, the contention which I have already advanced in regard to Article 6 is accepted as sound, and, finally, the contentions which I am to advance in regard to Article 7—if those should also be accepted—then the final consequence of the argument, as I have now stated it to the Court, would be that the whole of the Mandate agreement is no longer in force as a treaty or convention.

As regards the Separate Opinions in 1950 of Judge McNair and Judge Read, our contention that the Mandate is no longer in force as a treaty or convention also involves some measure of conflict, but only in so far as Sir Arnold McNair found that the expression "Member of the League" was "descriptive" and not "conditional". He stated that at pages 158-159 of the Opinion. But perhaps I should refer first to a passage at the beginning of page 158:

> "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."

So, there, the learned judge appears to find that there is still a contractual relationship in force as between the Mandatory and the other Members of the League, and he says so specifically at the bottom of the page:

> "... and I have endeavoured to show that the agreement between the Mandatory and other Members of the League embodied in the Mandate is still 'in force' ". (*1950 Opinion*, p. 158.)

And now follows the *ratio* for this finding:

> "The expression 'Member of the League of Nations' is descriptive, in my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it'; their interest in the performance of the obligations of the Mandate did not accrue to them merely from membership of the League, as an examination of the content of the Mandate makes clear." (*1950 Opinion*, pp. 158-159.)

It is on the basis of this reasoning that Sir Arnold McNair found that there was still a contractual relationship in force as between the Mandatory and other Members of the League. But the passage which I read earlier renders it clear that, had Sir Arnold McNair not made that finding, then he would have come to the conclusion that the Mandate still existed as an objective institution, although there would then have been no surviving contractual relationship. The passage which I read earlier is at page 156-157 where he said:

> "This status—valid *in rem*—supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League."

Therefore, Mr. President, it was only in respect of this finding—on the basis of this finding—that the expression "Member of the League" was descriptive and not conditional for intended parties, that Sir Arnold McNair came to the conclusion that a contractual relationship still subsisted. That reasoning I propose to deal with specifically in the portion of my argument concerning Article 7, because it is particularly applicable there. Apart, then, from questions pertaining to Articles 6 and 7, my contentions regarding the cessation of the operation of the Mandate as a treaty or convention are not in conflict with anything found either in the majority, or in the minority, Opinions in 1950.

[Public hearing of 8 October 1962, afternoon]

Mr. President, I had at the adjournment virtually completed my argument on the question of the effect of the dissolution of the League on the Mandate seen as a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. It remains for me only to deal in that regard with certain specific averments by the Applicants. I have dealt with their main arguments in that regard; but there are certain averments which deal with this aspect of the subject and which have, in effect, been answered, but I would just like to put the specific answers on record.

In their Observations at page 421 (I) the Applicants state this—I am reading from just about the middle of the page, the middle of the second paragraph:

> "The question before the Court is whether Respondent's duties under the Mandate instrument continue to exist, that is to say,

whether Respondent's administration of the mandated territory which is based on the Mandate instrument is free of the obligations prescribed in that instrument."

I point out that for the purposes of this contention that is not the question at all. The question is not whether those duties continue to exist, but, assuming as we do for purposes of argument that they do exist as far as the substantive obligations are concerned, what is the *causa* for their existence. I have dealt with that question fully. Then, at page 426 **(I)** of the Observations, the Applicants state, in the third paragraph, the second sentence:

> "Its [that is, Respondent's] contention is exactly that advanced by it in 1950 before the Court, and which the Court rejected, namely, that the dissolution of the League caused its obligations defined in the Mandate instrument to lapse."

That is not our contention; indeed on the contrary, we assume for purposes of argument the existence of the substantive trust obligations. Then, still at page 426 **(I)**, the Applicants state, just below the quotation:

> "Respondent still views the Mandate as a bare contract",

and somewhat further, three lines from the bottom of the page:

> "All that Respondent has done in its more modern version has been to add one more possible contractor who could have 'fallen away' by virtue of the League's dissolution, in spite of the fact that the Court clearly stated that the Mandate may not be analyzed as a mere contract." (*Observations*, p. 426 **(I)**.)

Mr. President, far from viewing or analyzing the Mandate as a "bare" contract or as a "mere" contract, our contention assumes the dual effect of the Mandate, the contractual as well as the objective status which resulted from the Mandate. The latter status could, as far as we assume for purposes of argument, have survived the dissolution of the League, whereas the contractual aspect fell away. This comment of the Applicants is therefore also not justified. Also, it is not true or correct to say that we have added another contractor who could have fallen away. I think I have made it clear that for purposes of argument it makes no difference whatsoever whether the League alone is seen as the contracting party *vis-à-vis* the Mandatory, or whether the Members of the League are so seen or whether the situation is seen as being the League and its Members. What is important is that the circle was no wider than the League and/or its members. Then at page 427 **(I)** of the Observations the Applicants state:

> "... it is an imposition upon the Court for Respondent to present the same basic argument as before, and at the same time propose a *de novo* consideration".

Now again, Mr. President, the argument is not the same, basically or otherwise. It assumes as correct the basic finding of the Court in 1950; and in the limited respects regarding Articles 6 and 7 in which it is in conflict with what the Court decided in 1950, we have given, I submit, good reasons for a deviation from the Court's finding as far as Article 6 is concerned. And I will proceed to state our reasons regarding

Article 7, which I submit are equally good reasons. That brings me to the end of that particular portion and I can proceed to deal specifically with *the effect of the dissolution of the League regarding Article 7 of the Mandate.*

Now, I have pointed out that the second portion of Article 7, which is the crucial compromissory clause, required for its operation "another Member of the League of Nations" to invoke that jurisdiction. It is common cause between the parties that during the lifetime of the League, each Applicant would have fallen within the meaning of that expression and could in a fit case have invoked the jurisdiction of the Court. But the issue between us is whether that is still the situation, since the dissolution of the League; whether any State can now still qualify to invoke such jurisdiction within the meaning of the expression "another Member of the League of Nations". We, representing the Respondent, contend for a negative answer and the Applicants contend that certain States, including themselves, can still so qualify. That is, broadly speaking, the issue regarding Article 7. Before I develop the arguments in that regard, may I just again refer to the implications; to exactly how and where this argument fits into the pattern of our objections and our contentions regarding the first two objections. If our contention regarding Article 7 should be sound then the effect would be, in the first place, that in conjunction with the argument which I have already addressed to the Court regarding Article 6, and in conjunction with the argument which I addressed to the Court this morning in regard to Articles 2 to 5, the effect would be that the whole of the Mandate agreement has ceased to be a treaty or convention in force within the meaning of Article 37 of the Statute, that being the first of our three contentions relative to the first two objections. But we contend in any event, secondly that whatever the situation might be in regard to other portions of the Mandate Agreement, the effect of our contentions regarding Article 7 is that Article 7 itself ceased to be so in force as a treaty or convention—that is our second contention. Our third and alternative to the second is that even if Article 7 could be said to be so in force, the Applicants are not qualified to invoke it.

I will proceed to deal first with a development of our argument as to the proper interpretation of that phrase "another Member of the League of Nations" in its context in Article 7. But before doing so, I think it would be convenient if I were to refer to something which the Applicants raise in this regard and which might almost be regarded as an objection to our objection. They quote in their Observations, at page 440 (I) a passage from a statement made by a representative of the Union of South Africa in 1950. They say it was Mr. D. B. Sole. That was not correct, the representative was Dr. Dönges, but that does not matter. The point is that this statement is cited here by the Applicants, at page 440, and they refer to it as if it was something said by a representative of Respondent "speaking for Respondent". Those are the words used at page 440. And they say about it earlier, at page 437, just above the heading "A. Judicial, Scholarly, and Other Authority," that our contention—our submission regarding Article 7—"is inconsistent with the prior decisions of this Court, as well as with scholarly authority and the admissions of Respondent itself before the United Nations", that statement apparently bearing upon this portion here cited at page 440. Further, at page 440, after the quotation, they say of it, in the Summary—the last sentence:

> "The latter admission, 'though not conclusive as to (the meaning of Article 7, has) considerable probative value (since it contains) recognition by a party of its own obligations under (Article 7)'." (*Observations*, p. 440 (I))

Now, Mr. President, what I want to indicate in regard to that passage is, in the first place, that when it is properly interpreted in its context it is very doubtful, to put it at its lowest, whether the representative intended to do anything more than to set out the effect of the Opinion of the Court on this particular point. But even if he should have intended anything more, if he should have added something by way of comment—apart from merely stating the effect of the Opinion of the Court—then it is perfectly clear from the context, from explicit statements made by him before and after this passage in the course of his address, that he was not speaking on behalf of his government and that his government had not yet taken any attitude about the matter and that nothing that he could say at that stage must be taken as binding his government in any way. Therefore what he said could not have been understood by anybody as being spoken on behalf of the Respondent, as being an admission on behalf of the Respondent, of binding the Respondent in any way or of indicating an admission or recognition by a party of its own obligations. I shall deal with those submissions in a moment with reference to the address.

Now first, Mr. President, as regards the interpretation of the statement itself, two paragraphs before the portion which is quoted in the Observations the speaker started by stating:

> "It will be recalled that the Court advised",

and then he proceeded to state the effect of what the Court had advised and he proceeded to deal with that and also to make certain comments of his own apparently in that regard. I must admit immediately, the statement is confusing in the sense that the speaker did not always clearly distinguish between what was his own comment and what was a statement as to the effect of the Opinion of the Court. Possibly the question of the use of quotations, or the absence of quotation marks, may also have made a difference. But in fact one finds that when he comes to this passage which is quoted, it really consists of a piecing together of certain statements by Judge McNair at page 158 of his Opinion and certain statements by Judge Read at page 165 of his Opinion.

So, for instance, the first sentence in that quotation is:

> "Now the Mandate, as has been shown, provided two kinds of machinery for its supervision by the League of Nations—firstly, there was the judicial supervision by means of the right of any member of the League under Article 7 to bring the mandatory compulsorily before the Permanent Court. And secondly, the administrative supervision by means of annual reports and their examination by the Permanent Mandates Commission of the League." (*Observations*, p. 440 (I))

That is almost verbatim what Sir Arnold McNair said at page 158:

> "The Mandate provides two kinds of machinery for its supervision..."

and it goes on to the judicial and the administrative.

And so, the next sentence then, in the quoted portion:

> "The judicial supervision provided for in Article 7 of the mandate has been expressly preserved by means of Article 37 of the Statute of the International Court of Justice..." (*Observations*, p. 440 **(I)**.)

For that portion, again the statement that there has been an express preservation by means of Article 37 is taken from Sir Arnold McNair at page 158 where the learned judge stated:

> "The *judicial supervision* has been expressly preserved by means of Article 37 of the Statute of the International Court..."

The other sections, and even the phrase "reinforced by Article 94 of the Charter", come from Judge Read's Opinion at page 169 where Judge Read said:

> "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."

And the statement continues, as quoted:

> "... and the Court has in fact found that the Union of South Africa is therefore still under an obligation to accept the compulsory jurisdiction of the Court according to the provisions mentioned". (*Observations*, p. 440 **(I)**.)

That may possibly be a reference to the Court in the sense of the majority of the Court,. which also made a finding specifically on that point, as compared with the statements which have been cited from the judgments of Sir Arnold McNair and Mr. Justice Read. The quoted statement proceeds:

> "Any State which was a member of the League at its dissolution could therefore still implead the Government of the Union of South Africa before the International Court of Justice in respect of any dispute between such a member state and the Government of the Union of South Africa relating to the interpretation or the application of the provisions of the Mandate." (*Observations*, p. 440 **(I)**.)

That sentence could be taken either as being a statement by the speaker himself, or as stating the effect of what the Court had found, in the context there. But, Mr. President, as I have said, I must admit the statement is a most confusing one in that respect and I am perfectly prepared to assume, for the purposes of my argument, that the speaker here went further than stating the effect of the Opinions.

Even then it becomes very clear from the context and from the circumstances that he never intended to say anything on behalf of his government and that he could not possibly have been so understood. The occasion on which he spoke was in December of 1950, some months after the Advisory Opinions had been delivered. I think the Opinions had been delivered in July of 1950. And in stating the attitude of the Respondent to the Court in this regard in the Advisory Proceedings, Dr. Steyn, at page 288 of the *Pleadings* as officially printed, had stated there:

"And finally, there is no State legally competent to refer disputes relating to the interpretation or the application of the provisions of the Mandate to the International Court of Justice, the competence to do so having been limited by Article 7 of the Mandate to Members of the League."

So the attitude, as stated to the Court—the attitude of the Respondent—was very clearly that there was no longer compulsory jurisdiction in terms of Article 7 for that reason, because there were now no longer any Members of the League. Dr. Steyn had also advanced to the Court the main contention to which there has been ample reference in the *Pleadings* by the Applicants themselves in this case, namely that the Mandate had, as a result of the dissolution of the League, lapsed *in toto*. So, if the Mandate had lapsed *in toto* there could not possibly have been any question of compulsory jurisdiction in pursuance of Article 7 of the Mandate. Those, in both respects, were attitudes stated on behalf of the Union Government. But now, in the address by Dr. Dönges in December 1950, he commenced (in document A.C. 4/185, from which the passage is cited by the Applicants) early in his statement (it is at page 3 of that document) to state the following:

"Now, I come to another point which has concerned several delegations, and which was first put to me in the form of questions by the distinguished delegate from the Philippines, and which was also repeated by many other delegates, and again this afternoon in the speech which preceded mine, by the distinguished delegate from Mexico. The question was, what was the decision of South Africa in regard to the advisory opinion of the International Court. I anticipated that question in my opening statement. To make it plain I have merely to refer to what the distinguished delegate of Ecuador has already stated today, namely, that the position taken up by South Africa in this regard is crystal clear. I said then that I did not propose to participate unduly in this debate on a matter on which my Government will later on have to define its position." [I repeat] *"on a matter on which my Government will later on have to define its position."*

And that is the position of South Africa in regard to the Advisory Opinion of the International Court. The speaker proceeded:

"I said that 'it would be readily understood that the nature of the resolution, that is the resolution to be adopted by this Committee and by the General Assembly, will have an important effect on my Government's decisions', and while we are not prepared to slam the door on any attempt to find an amicable solution of a question which has vexed us for so long, we sincerely hope that the Organization on its part will not do so either." (*U.N. Doc.* A/C. 4/185, p. 4.)

There, very clearly, his government had taken no decision and would later on have to define its position. And then, at the end of the address, after the quoted passage and at the very conclusion (page 16 of the document) the speaker stated:

"The Committee will, therefore, realize that this new development is a factor which has also to be carefully weighed and considered by

my Government, together with the attitude of the United Nations in regard to the international position of South West Africa as expressed in any resolution which may be adopted by the General Assembly. It would be premature to expect me to say or do anything which could possibly be interpreted as binding my Government in any way until it has had every opportunity of considering fully and carefully the whole problem in all its aspects." (*U.N. Doc.* A/C.4/185, p. 16.)

That, I submit, Mr. President, renders quite clear that the speaker did not intend, and that his audience could not have understood him as intending, to state anything that could be regarded as binding his government, as being an admission by his government, as being a recognition of any duties still incumbent upon his government.

I may point out further in that regard too, that shortly afterwards, in June 1951, after resolutions had been taken at the United Nations and after the Union Government had had an opportunity of defining its attitude, its attitude was stated by its representative to the *ad hoc* Committee on the 27th June 1951. I quote from the Applicants' Memorials, pages 56-57 **(I)**, where they set that out. I read about eight lines from the bottom of the page:

"... the Union representative stated, according to the summary records, that 'the International Court had expressed the view that these obligations remain legally in force, a view to which apparently the majority of the United Nations subscribed. His Government did not agree with the opinion of the Court as endorsed by the majority of the United Nations on this point. It held that, since one of the two parties to the contractual arrangement had disappeared, the Mandate had lapsed and it could no longer be regarded as a legally binding contract and that, in consequence, the Government of the Union, in contrast to the opinion of the Court and of the majority of the United Nations was of the opinion that it no longer was legally bound to carry out the provisions of the Mandate in question. Here, therefore, there was disagreement'."

So, Mr. President, on the last occasion before this statement, where there had been a formal statement of the attitude of the Union Government, and on the first occasion afterwards, one finds a very clear intimation of the position of the Union Government, again showing that what was stated by the speaker on that particular occasion was not intended to be spoken on behalf of his government. And, indeed, in the Memorials, the Applicants had already referred to this particular passage on which they now rely as an admission. And there they appear to have conceded that it could not be regarded as an admission on the Respondent's behalf, because they stated there, at page 93 **(I)** in a footnote:

"Presumably, the Union denies that Article 7 is in force since it states that the Mandate is not in force. It is well to note, however, that on 7 December, 1950 the Union's representative to the Fourth Committee stated..."

and then followed an extract from the statement which is also now quoted. So there was an indication that the Applicants realized that this was, in truth, no admission at all—the statement which is now relied upon by them as being such an admission.

I proceed with the argument on the merits of the dispute between us and the Applicants as to the meaning and effect to be given to the expression "another Member of the League of Nations" read in its context in Article 7 of the Mandate Agreement.

Mr. President, what is that context? The context is one of a compromissory clause in which the Mandatory agrees to accept the compulsory jurisdiction of the Court for certain types of dispute as defined. That consent is qualified with reference to various things and qualified, *inter alia*, with reference to the party or parties who could, in the case of a dispute as defined, bring the Mandatory before the Court. Indeed, that party is referred to as being the other party to such dispute; the dispute must arise between the Mandatory and another Member of the League.

The reference to that other party to the dispute is not to another State or States by name but to another State or States to which the expression "Member of the League of Nations" applies. Now, may I refer the Court again to the wording of the second part of Article 7, which I now propose to read elliptically for a closer analysis of context on this particular point. I read the words:

> "... if any dispute whatever should arise between the Mandatory and another Member of the League of Nations [I am skipping some words] such dispute [omitting again] shall be submitted to the Permanent Court".

And so we have: "If any dispute should arise between the Mandatory and another Member of the League ... such dispute ... shall be submitted to the Permanent Court." In the context, both the literal meaning and the natural and ordinary meaning is perfectly clear, and that is that this other State must be a Member of the League of Nations at the time when the dispute arises; at the time, therefore, of envisaged application of this clause, when there may then be such a reference of the dispute to the decision of a Court. And if the other party to the dispute does not comply with this qualification to the consent, then the consent does not cover the particular case. If the other party is not, at the time when the dispute arises and when the occasion comes for a reference to the Court, if that party is not then another Member of the League of Nations then the consent does not apply to that particular case.

The effect, Mr. President, of this construction may be described in two ways. One may say that the *expression* "another Member of the League" is *descriptive*, but it is descriptive with reference to the *time of envisaged application* of the clause. It describes what the other party is to be at the time when the clause is to come into operation. As I shall later emphasize, to talk of a descriptive meaning has little purpose unless the description is related to a point or a period of time.

That is one way of describing what the effect is of this natural and ordinary construction of this clause. The alternative way of describing it is to say that the *right* of the other State to take the Mandatory to court is *conditional* upon that State complying with a qualification at the *time of envisaged application* of the clause. One could put it in two ways. One can say the expression is descriptive, but at the point of envisaged application. One can say, alternatively, the right of the State is conditional upon that State complying with the qualification, but again at the time of envisaged application—that being the important factor in both instances.

That is not only the natural and ordinary way of interpreting the language which we find here, it is a perfectly ordinary and very common and usual thing in matters of jurisdiction, in matters of *locus standi*, in questions pertaining to competence to bring judicial proceedings, to adjudge those questions as at the stage of the institution of the proceedings. That is the normal thing which one finds in all systems of the law of procedure. But be that as it may, in this particular context here, taking the wording into account and taking into account the context as a compromissory clause, that is the literal interpretation—indeed the only literal interpretation—and it is the only ordinary and natural meaning that could be given to the language.

Therefore, in terms of the principle of natural construction as we have noted it from the *Second Admissions* case, the next stage in this enquiry is now: does that construction make sense? Do the words read in this meaning, in their ordinary, natural meaning in the context, do they make sense or, on the other hand, are they ambiguous or do they lead in practice to an unreasonable result? Because, as the Court will remember, according to the principles as they are stated in the *Second Admissions* case, if the natural construction makes sense that is the end of the enquiry.

Our submission is, Mr. President, that there is no ambiguity whatsoever and that, on an analysis of the practical implications, one finds that this natural construction leads to a result which, far from being unreasonable, does make sense and accords with the probable intentions of the parties.

For the purposes of developing this submission, I remind the Court again—without going into detail because I have covered that field—of the analysis which has been made in the Preliminary Objections and which I referred to in my argument this morning, of the provisions of the Covenant of the League, which, in all except a few of its clauses, contains the expression "Member of the League" or "Member of the League of Nations", or a similar expression. In each one of them one finds that that reference to membership is intended to relate to the time of envisaged application of that clause. Where there is an obligation to contribute to the expenses of the secretariat, surely that applies to a Member of the League who is a member at the time when the obligation accrues. Where there is an obligation to exchange information *inter alia* about armaments and so forth, as between Members of the League, surely that obligation applies to a State if at the time when there is to be such an exchange that State is a Member, otherwise it does not apply to it. When it applies to a right to be elected to the Council, the same thing goes—the State has to be a Member at the stage of election or at the stage of taking session on the Council if elected, otherwise this clause does not apply. And so one can go through with each one of them; that is every time the interpretation which makes sense and which accords with the probable intentions of the parties, apart from being, in each instance, also the natural construction of the language in the context.

And likewise where we find in the Mandate instruments themselves either a use of the expression "another Member of the League of Nations" or we find a clause which appears to be intended for the benefit of another Member of the League of Nations, one can find as a matter of probable intent and as a matter of natural construction the same idea

that membership must be there as a qualification at the time of the envisaged application of a particular clause.

Take the open-door arrangement in the A and the B Mandates for the benefit of other Members of the League and their nationals. Surely that benefit is to apply while a State is a Member of the League and not at any other time. And therefore, again, in those instances of interpretation in accordance with the idea of documents *in pari materia*, one finds that the natural construction is confirmed.

Indeed as a result of the submissions I made to the Court this morning, based on this same analysis, one comes to the conclusion that the only States for whom substantive rights were intended *vis-à-vis* the Mandatory under the Mandate Agreement were Members of the League, and that those substantive rights would apply only for so long as they were Members of the League. Now surely if that were so, then a compromissory clause aimed at the enforcement of substantive rights by the other parties to the contract could only make sense if it too is limited for the duration of the other party's membership of the League. Otherwise we would have this strange and anomalous position of a Member of the League having no substantive rights under the Mandate Agreement but still having the facility at its disposal of invoking a compromissory clause. The question might be asked then: What for, if there is no substantive right which can be enforced?

We deal specifically in the Preliminary Objections, at page 365 (I), paragraph 6 of the Fourth Chapter, with the anomalies that would flow from a result whereby an ex-Member of the League could still implead the Mandatory under Clause 7. We would have the position that the State would no longer be a Member of the League; it could no longer raise any questions about the Mandatory administration in the League Council, in the organs of the League; it could no longer ask the League to take action about it; but it could still take the Mandatory to court or force the Mandatory to negotiate with it to avoid being taken to Court. This position would be the more anomalous, if the rights and interests which could be taken to court under this compromissory clause by Members of the League should include the interests of the inhabitants of the territory—even in cases where the other Member of the League may have no direct material interest of its own or indirectly through its subjects in the subject-matter of the particular dispute. We contend for the purposes of our third objection that that interpretation is not to be given to Article 7, that the only types of disputes envisaged by the Article which could be taken to court would be those in which the other State—the other Member of the League—would have a material interest either for itself as a State or for its subjects or nationals, and, therefore, the type of case which concerned solely the interests of the inhabitants of a particular territory, that type of case was not intended to be covered by Article 7 at all. But for the purposes of the first and the second Objections we assume that the position could be either way as far as that was concerned. If we should at this stage, in conflict with our submission for the purposes of the third Objection, assume that the wider interpretation be given to Article 7 on that particular point so that another Member of the League could take the Mandatory to court even on a matter which concerned the inhabitants' interests alone, that position would become even more anomalous when it is extended to ex-Members of the League. Because

then we could have this position: that a State is a Member of the League for some time and is either expelled or resigns from the League; the Mandatory continues to administer the territory in accordance with policies discussed in the Permanent Mandates Commission and approved of—unanimously approved of—by the Council, but that policy is not in accordance with the wishes, or in accordance with the views or desires, of this ex-Member of the League. Under a construction whereby that ex-League Member would still have the competence to invoke Article 7, he could then take the Mandatory to court on a matter which complies entirely with the views of the supervisory organ—the Council—but still the Mandatory would have to account to this ex-League Member, negotiate with him and be subject to compulsory jurisdiction of a court if the negotiations should lead to nothing. That would clearly be a completely anomalous result.

Similar considerations of a practical nature apply—and one could easily think of examples—to other instances where the expression "Member of the League" is employed, for instance in other Mandates with regard to the open-door provision, as I have stated before. In all these other Mandate instruments, in all the provisions of the Covenant where the expression "Member of the League" is used, one finds that the natural interpretation, and the one that makes sense, is the one that relates the requirement of membership to the time of envisaged application of the particular provision. There is not a single instance which we could find in which the expression was used in any other sense, either in the Covenant, or in any other Mandate instrument. And therefore we submit that the natural meaning is confirmed by the practical implications bearing on the probable intent of the parties.

Mr. President, in everything that has been written about this question —and that is a great deal—including what has been written in pleadings now before the Court, the only *meaning* alternative to the one which I have just advanced to the Court, is that in the separate judgment of Sir Arnold McNair, to which I referred this morning—what one might briefly term his "descriptive meaning". I have nowhere, with any other author or even in the submissions of the Applicants, found any suggestion as to an alternative meaning. The Applicants contend for a different *result*, but that is not by attaching a different meaning to this phrase, as I shall endeavour to show later.

Sir Arnold McNair said (if I may remind the Court) at pages 158-159:

> "The expression 'Member of the League of Nations' is descriptive in my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it'."

And it was on the basis of assigning this meaning to the expression "another Member of the League of Nations" or "Member of the League of Nations" that Sir Arnold came to the conclusion both that Article 7 remained in force, and indeed that the Mandate as a whole remained in force as an agreement. Because it seems quite clear from the rest of his reasoning that had it not been for this conclusion he would have found that the Mandate ceased to exist in its contractual operation—that is as a treaty or convention—although remaining in objective existence in the manner in which he explained.

This may be a convenient stage now for examining, with respect, the

reasoning involved in this "descriptive" meaning suggestion, both for the purposes of Article 7 and for the purpose of the whole question whether the Mandate Agreement remained in force as a treaty or convention. Now what did the learned judge mean by that expression—"descriptive" and "not conditional"? Apparently, it seems, with respect, that what he had in mind was that Article 7 was not intended to prescribe, in its reference to another Member of the League, a qualification with which the other party to the dispute is to comply, but, just as the clause might have said "if a dispute should arise between the Mandatory and States A, B, C, D and E" (mentioning them by name), or, as the clause might have said "any State mentioned in the annex hereto" (and then incorporate a list by reference), just as that would be a descriptive method of stating who the other parties to this arrangement would be, just so, this reference to "another Member of the League" could be read as referring to every State that was a Member of the League, just as if a list had been attached with the names of those States: so that the reference is to the State, and not to the State in a capacity as a Member of an international organization. That appears to be the idea underlying this suggestion—the idea then that led to the conclusion that even after dissolution of the League, and even after loss of membership of the League, the States that had been Members could retain their rights under the Mandate—their contractual rights *vis-à-vis* the Mandatory generally, and, in particular, their competence to invoke Article 7.

Now, Mr. President, it is exactly for the purpose of that type of reasoning that I mentioned earlier, that calling a meaning "descriptive" does not really help, unless it is brought in relation to a point, or a period, of time. Look at the problem with reference to a "Member of the League". If the meaning was intended to be descriptive, in the sense which I have endeavoured to explain, does that description apply to Members at the time when the Mandate Agreements were entered into, or does it apply to any States that at any time became Members thereafter—or would become Members thereafter—or would it apply only to States that remained Members until the League's dissolution? What exactly was intended to be referred to in this description, because the three alternatives that I have now stated would have involved three alternative lists, if they are seen in accordance with the concept of, say, an annexure to the Mandate agreement, something that is incorporated by reference. There would be three alternative lists of States, according to those, three alternative possibilities. There is nothing in Article 7 itself—or indeed in the Mandate Agreement as a whole, or anywhere in the Covenant or associated documents—which could throw any light, as a matter of choice, on any of those three possibilities—as to which of those three one would have to choose for purposes of a "descriptive meaning" interpretation.

Let us examine the implications of those three from a practical point of view. Let us take, first, the possibility of those States that were Members at the time when the Mandate Agreement was entered into—that that was the list of States intended to be referred to. On that basis, Mr. President, the interpretation would exclude States who later became Members of the League. They would then never acquire the competence to invoke Article 7 and that, in itself, seems a most unlikely contemplation or intention for the parties to this agreement. Secondly, the implication would be that a State which resigns from the

League, or is expelled from the League, during its lifetime, could still, even after that event, have the competence to invoke Article 7, which would again be a most unlikely contemplation.

Let us take the second possibility, that the intention was to refer to States that might, at any time be, or become, Members of the League. There we would not have the first of the difficulties which I mentioned in regard to the first alternative, but we would still have the second one—we would still have this difficulty that States that ceased to be Members of the League even during its lifetime, by reason of resignation or expulsion, would retain competence to invoke Article 7, and that does seem a most unlikely contemplation.

The third alternative would be the point of time of dissolution of the League. The States intended to be referred to in Article 7 would then be States who would be Members of the League at the time of dissolution of the League. Now, Mr. President, in the first place, the difficulty with this suggestion is that it would seek to distinguish between States that lost membership of the League *before* dissolution and States that lost membership *at* dissolution and because of the dissolution. That is a distinction for which Article 7, or any other provision in the Mandate (or anywhere else), makes no provision whatever. There is not even any clue which could lead one to a conclusion that there was an intention to draw a distinction of that kind, as a matter of designation or meaning of this phrase "another Member of the League". The second difficulty about this suggestion—relating the description to the time of dissolution of the League—would be that that would attribute to the parties to the Mandate Agreements in 1920 a contemplation of what would happen at some future date when the League might be dissolved, something which does not appear to have been foreseen as a practical eventuality at that stage. It could have been foreseen, of course, as a theoretical possibility, as something that might happen, but it could not yet at that stage have been foreseen as a practical event in the sense that there could have been a contemplation on the part of the parties as to what the circumstances then would be, and what the implications would be of the situation. So that it seems most unlikely that the parties would, at the inception of their agreement relative to an organization which was intended to be a permanent or indefinite one, that they would now begin to make definite arrangements—by contemplation or otherwise—for that event of dissolution of that organization, and for what is to happen in such an event. More specifically, Mr. President, it would really mean that the parties here provided, in Article 7, for reference of disputes as therein described to a certain Court—the Permanent Court of International Justice—which was, in practice and, to the knowledge of the parties, dependent for its existence and its functioning upon the existence of the League of Nations—because of the manner in which the Court functioned, in which it was financed, composed, and so forth. Therefore, the normal contemplation would be that, if the League should fall away, the Court would fall away; and it seems most unlikely that the parties would have intended to make a provision whereby competence to invoke this clause—to take a matter to that particular Court—should be kept alive after the dissolution of the League, unless the parties had in mind already some method whereby the Court would be kept in existence and functioning despite dissolution of the League, or whereby there would be some other organization that would keep alive a Court and that could provide

Members who could take a matter to the Court. Surely it becomes completely unrealistic to attribute ideas of that kind to the founders of the Mandate system.

Therefore, Mr. President, there is, in my submission, no foundation whatsoever, with the greatest respect, for this "descriptive meaning" suggestion. It leads to all these difficulties and to all these anomalies; and when one has regard further to the fact that, as a matter of assigning a meaning to language, it must at least be classified as a somewhat unnatural and strained meaning, then surely it cannot compete, in any way, with the natural construction, the natural meaning which I suggested to the Court, which can be tested in all its practical implications, and which withstands the test of making very good and sound sense, in accordance with the probable intent of the parties.

Mr. President, I have said that Sir Arnold McNair was the only one who expressed this view as to an alternative meaning to be assigned to the expression "another Member of the League of Nations". Possibly Judge Read's separate opinion is to be read as implying agreement with Sir Arnold McNair on this point, but it does not say so anywhere expressly. The result, of course, of that opinion was also to keep alive on the part of States that were no longer members of the League after dissolution, the competence to invoke Article 7, and also to regard them as still having substantive rights under the Mandate contract with the Mandatory. And it may well be that for those reasons Judge Read's Opinion is to be read as being along the same line of reasoning as that of Sir Arnold McNair, implicitly. If so, the same argument which I have now addressed to the Court applies also to the case of Judge Read's opinion on this particular point.

In our Preliminary Objections at pages 370 (I) to 372 we dealt fully with the reasons which we respectfully advance why the interpretation of Sir Arnold McNair could not be accepted as legally correct. We dealt with the matter as one of principle, one of analysis, and we supported our submissions with reference to scholarly authority. Despite that fact, the Applicants nowhere in the written pleadings before the Court attempt to answer our argument in that regard, or to offer any argument in support of the "descriptive meaning" interpretation, though they cite that interpretation as a matter of a conclusion arrived at by Judge McNair. They cite in their Memorials at page 90 (I) and in their Observations at page 439 (I), an extract from Judge McNair's opinion which contains the portion in question. But they offer no argument in support of the interpretation. Their own arguments which they offer on this question of Article 7 implicity reject the "descriptive" meaning interpretation and proceed on a basis in conflict with it. Indeed, Mr. President, the Applicants nowhere dispute our analysis of the *meaning*, and I stress the *meaning* of the expression "another Member of the League of Nations" in Article 7. On the contrary, it seems implicit in the manner in which the Applicants seek to answer us that they accept that meaning as being a correct one. I have pointed out already that at page 448 (I) of the Observations they appear to accept that a State which had withdrawn or had been expelled from the League during its lifetime would have lost the right it had formerly possessed as a League Member. It seems that they intended that statement to apply also to the right to invoke jurisdiction in terms of Article 7, because that is the point with which they are dealing at that particular page—page 448

(I). They are dealing in this chapter with the question of the competence to invoke Article 7, and after making the statement to which I have just referred, they go on to conclude that portion with reference to our contentions and then to state their conclusion: "Applicants' legal conclusion—that they are competent to invoke Article 7 is supported by the authority...", and so forth. So *that* is the point with which they are dealing. And they appear, therefore, to accept at that particular stage that during the lifetime of the League, a State which had ceased to be a Member of the League would no longer be "another Member of the League" within the meaning of Article 7. Therefore, it seems, Mr. President, that they accept as a matter of linguistic meaning in the context this interpretation which we put upon that expression, but they contend for a different *result* from the one at which we arrive, for special reasons. Their submissions in that regard do not rest on giving a different *meaning* to Article 7. On the contrary, if we look at the nature of those submissions, not only at the way in which they are worded, but also at their substance as legal propositions, they appear to proceed from the basis of an implicit acceptance of the construction which we put on "another Member of the League" as a matter of meaning in the context. For they say that for reasons other than meaning, the expression "another Member of the League" is now to be regarded as referring to "former Members of the League as well as to Members of the United Nations". For these last words I quote from the Memorials at page 90 **(I)**—for the words "former Members of the League as well as to Members of the United Nations". They say in the first paragraph at page 90:

> "It is submitted that the phrase 'another Member of the League of Nations' as used in Article 7 of the Mandate, should be construed as referring to former Members of the League, as well as to Members of the United Nations."

Now surely, they cannot make that submission as a matter of assigning a meaning to "another Member of the League of Nations". They go on and they state in their Observations at page 446 **(I)**:

> "Even if the principle of succession as set forth above were not accepted by the Court in the instant cases, Applicants are nevertheless competent to invoke Article 7 inasmuch as they were Members of the League at the time of the League's dissolution."

And after referring then to the "principle of carry-over", they state at the bottom of the page:

> "Hence, States, such as Ethiopia and Liberia, which were members of the League at the time of the League's dissolution, remain within the description of 'another Member of the League' for purposes of the Mandate." (*Observations*, p. 446 **(I)**.)

Again, therefore, no suggestion that that expression still applies today as a matter of meaning, but that States to which the expression applied at the date of dissolution still would have the competence to invoke the Article. And finally, they also state with reference to their succession contention, at page 443 **(I)**, that (I am referring to the first

paragraph just before the one headed, Membership in the United Nations, the last sentence of that paragraph):

> "They [the Applicants] fall within the descriptive specification of 'another Member of the League of Nations' either as current Members of the United Nations or as Members of the League of Nations at the time of its dissolution."

Current Members of the United Nations could never as a matter of meaning be the same as "another Member of the League of Nations".

Indeed, Mr. President, if one looks now at what these two alternative contentions are—I say alternative; the Applicants do not advance them as alternative, but they say they rely on one or the other, or both. In essence they are, in my submission, alternatives, but I will deal with that point later. Let us just look for the moment at what these two contentions involve: succession by the United Nations to the League supervisory functions resulting in a succession also by United Nations Members to the competence of League Members to invoke Article 7—that is their first line of argument. The second one is a carry-over of the League's responsibilities regarding Mandates, resulting *inter alia*, in the keeping alive on the part of States that were Members of the League at the time of its dissolution of the competence to invoke Article 7. Surely neither of these would be necessary if the Applicants could assign to the expression "another Member of the League of Nations" a *meaning* which would keep on applying to them after dissolution of the League. They would not need a succession from one organization to another in order to bring them within the competence provided for by Article 7; and they would not require this conception of a "carry-over" of something, which had belonged to the League, to States that were Members of the League at the time of its dissolution, if they could by a simple expedient of assigning an alternative meaning to the expression—similar to what Sir Arnold McNair did—come to a conclusion that that expression in its meaning as construed still applies to them. What they are really saying in effect is that when regard is had to the meaning of that expression in the clause, the natural consequence would be that upon loss of League membership the competence provided for would also be lost, but that there are two special reasons why at the dissolution of the League that did not happen, why in spite of loss of the prescribed qualification, the competence to invoke the clause was nevertheless retained by States in the position of the Applicants. That is the effect of the argument which they are advancing to the Court. And that is the issue which has to be further considered, our submission being that as a result of this natural meaning of the expression "another Member of the League of Nations", the consequence of dissolution of the League is to end all League memberships; and therefore to end for all those States the competence to invoke Article 7. That submission must be sound, unless there is some special reason, something of the kind advanced by the Applicants, why, in spite of the loss of the qualification prescribed by Article 7, the competence could still be regarded as being alive.

[Public hearing of 9 October 1962, morning]

Mr. President, during yesterday's argument I concluded the development of our submissions regarding the meaning to be assigned to Ar-

ticle 7 of the Mandate, particularly as regards the expression "another Member of the League of Nations", our contention being that the natural ordinary meaning in the context, confirmed by the considerations which I dealt with, is to the effect that a State that would wish to invoke Article 7 would have to be a Member of the League at the time of envisaged application of the clause, that is at the time of the arising of the dispute which is sought to be referred to the Court for adjudication. I dealt with the consequence which that had in the lifetime of the League, namely that if a Member of the League should lose membership then it would also lose the competence to invoke Article 7. I pointed out that as far as these two propositions are concerned, which I have just stated now by way of repetition, there does not appear to be a dispute between our attitude and that of the Applicants, but that the dispute comes in at the next stage. We say the further logical consequence of that meaning of Article 7 is that on dissolution of the League and upon loss of all League memberships there ceased to be any States with the necessary competence to invoke Article 7, with the result that Article 7 practically became incapable of performance and inoperative. That consequence, we submit, must necessarily follow from the meaning of Article 7, unless there was some special reason to prevent it, unless there was some special cause or ground which could have the effect that States could either retain or acquire the competence to invoke Article 7, despite the fact that they did not have the qualification or no longer had the qualification prescribed therein, so that this special ground for still being able to invoke the jurisdiction of the Court relative to matters concerning the Mandate would then have to be based on something other than membership of the League. It would have to be some special ground providing for such competence despite absence of the qualification of membership of the League. And the Applicants' argument in this regard is in effect an attempt to invoke such special reasons of the kind that I have mentioned. In order to achieve its effect of resulting in jurisdiction of the Court at the instance of such parties, such a special ground or reason would have to be based on the consent of the Mandatory because that is the fundamental requisite for jurisdiction of this Court. That consent, because of the meaning of the text which I have exhaustively dealt with, is not provided for in the text expressly. It would therefore have to be found either by way of an implication to be read into the text, or it would have to be found outside the text altogether. And, as I have said, it would have to be something which involves the consent of the Mandatory to the effect that such other State, not a Member of the League, would have the competence to invoke Article 7. It seems common cause, Mr. President, that such consent outside of the text of Article 7 was never *expressly* given, and the only question that could then remain is whether it was ever *tacitly* given, either as I have said, as an implication in Article 7 itself, or on any other occasion. Here again, one is to have reference to the two main occasions on which it would be likely, on which one could expect such consent to have been given, if at all. The first would be at the time of entering into the Mandate Agreement—something to be read as being part and parcel of the arrangement or the contract then made. Or the alternative would be at the transition stage during the years 1945 and 1946 when the United Nations were founded and when the League was dissolved.

The Applicants, on the two grounds which they invoke—special grounds—attempt to attribute to themselves the competence to invoke Article 7. In the first one of these, succession, they attempt to found that, upon analysis, on an implication to be read into Article 7 itself, that is, something said to be tacitly agreed upon at the time when the Mandate Agreement was entered into. They state their contention in this form at page 446 (**I**) of the Observations:

> "Put in the form of the analysis of Judge Lauterpacht stated above, a holding by the Court that United Nations Members have succeeded to the functions of League Members *vis-à-vis* the Mandate would be 'no more than an example of legitimate application of the principle of effectiveness to basic international instruments'."

Their contention then seems to be basically that United Nations Members have succeeded to the functions of League Members *vis-à-vis* the Mandate. That appears to be the succession contention relative to Article 7. The line of reasoning in support of that contention is to be found over the pages 440 (**I**) and following, as far as page 446. As I understand the line of reasoning, Mr. President, it amounts to this, that this contention of succession regarding Article 7 is really a corollary to the contention of succession regarding Article 6, something which followed as a consequence from the alleged succession of the United Nations to the supervisory functions of the League regarding Mandates. But then there are certain additional links in the chain which have to be filled in for purposes of the contention of succession regarding Article 7. They are separately advanced by the Applicants, and I shall deal with them in due course. The steps in the reasoning appear to be in the first place that the legal interests of Members of the League in the performance of the Mandate encompassed a good deal more than their own material interests as States and the interests of their subjects or nationals; it encompassed also the due performance by the Mandatory of the sacred trust of civilization, and that the competence of Members of the League therefore to invoke Article 7 was particularly directed towards this purpose, towards seeing, in the interest of the inhabitants, that the sacred trust of civilization was duly complied with. We find that basic proposition stated in the Observations at various places, first at page 441 (**I**), where there is a reference to a passage in our Preliminary Objections where we dealt with the legal position on the basis of the League being a legal *persona*. We submitted there that on that basis the legal interests of Members of the League as distinct from the League itself would have been confined to matters which operated for their benefit and for the benefit of their nationals. Now the Applicants answer that by saying:

> "Respondent understands the 'benefit of the Members' to mean material benefits in terms of trade and commerce or specific benefits to their nationals in such terms as rights of entry, freedom of action for missionaries, etc. This is far too narrow and technical a conception of 'benefit' or 'interest'. If these had been indeed the sole interests of the Members of the League, one could understand and possibly even admit a contention that such 'legal interests' lapsed with the termination of the League's existence. But the 'interests' of the Members of the League in the Mandate, properly understood, encompassed the achievement of the 'material and

moral well-being and the social progress of the inhabitants' of the Mandated Territory as a 'sacred trust of civilization'." (*Observations*, p. 441 **(I)**.)

There is then further comment along the same lines. I have pointed out before that the Applicants apparently missed the point here, that we were there dealing with the matter purely on the basis of the League being viewed as a legal *persona*, and also that for purposes of our First and Second Objections, we make the same assumption as they do, that Article 7 of the Mandate had the wide effect of enabling Members of the League to invoke the jurisdiction of the Court in matters not only affecting their own material interests, but also in cases affecting the interests of the inhabitants alone. We make assumptions both ways, we argue the matter on the basis of both the narrower and the wider interpretation of Article 7 on that point for the purposes of our First and Second Objections. Of course, the point itself is the subject of our Third Objection where we deal exhaustively with our contention for the purposes of that objection, that the narrower of those meanings is to be assigned to Article 7. In any event, this is the basic proposition made by the Applicants for the purposes of their contention of succession regarding Article 7. They start off with the proposition that the legal interests of the Members of the League had this wide purpose to which I have referred.

The first stage in their reasoning then is that the purpose of Article 7 was to secure judicial supervision of Mandatory administration also, and particularly, for the purpose of seeing that there was due performance of the sacred trust of civilization.

The second stage in the Applicants' reasoning is that such judicial supervision, like administrative supervision in pursuance of Article 6, is to be regarded as a necessary, an indispensable, an inseverable element of the Mandate institution which must necessarily survive if any portion of the Mandate is held to survive. That we find stated very pertinently at several places in the Observations. At page 441 **(I)**, we find in the last paragraph but one:

"In this true sense, the legal interests and responsibilities of Applicants could not and did not lapse so long as the Mandate exists and so long as Respondent occupies or administers the affairs of the Mandated Territory. The continuance of their legal interests and responsibilities as Members *necessarily imports* their *capacity* (and duty) to invoke the *powers* of this Court under Article 7 of the Mandate."

Necessarily imports a power and capacity. At pages 441-442 **(I)**, we find:

"Respondent's Second Objection, in addition to ignoring the foregoing principles, would undermine the jural relationship envisaged by the Mandates System as linking the four essential elements of that system [I stress, Mr. President, essential, the four essential elements of that system]: the Mandatory, the League of Nations, the Members of the League, and the Permanent Court of International Justice.

Irrespective of the theory upon which rests the inescapable and judicially settled conclusion that the Mandate did not die with the League's dissolution, these four sides of the quadrilateral jural

> system must survive, if any one of them is held to survive as part of the Mandate." (*Observations*, pp. 441-442 **(I)**.)

So there, definitely, there is a submission that if any portion of the Mandate survives, then all four portions must survive, including judicial supervision. And, at the bottom of pages 442-443, we find this passage:

> "The Mandate is a creature of the organized international community, as well as the subject of a legal interest of such community and its Members. Its existence today rests upon the continued vitality of the authority conferred upon Respondent by the organized international community and by the continued vitality of the rights of such community and its Members to ensure that the Mandate is properly administered."

Just to go back, for the purpose of analysis; the existence of the Mandate rests *inter alia* upon the continued vitality of the rights of the community and its Members to ensure proper administration of the Mandate. So that again the suggestion is that there can be no existence of a Mandate unless there is a continued vitality of a right on the part of States to ensure compliance with the Mandate.

And, finally, at page 443 **(I)**, we find:

> "Although they have been succeeded or replaced by other organs, the Court in its 1950 Advisory Opinion ruled that the Mandate survived, and consequently, that international supervision of the Respondent, as Mandatory, endures."

By that "international supervision" in the context, read with the previous portion of the page, they refer both to "administrative" supervision and to the so-called "judicial" supervision.

So again, the suggestion here also—the second step in the reasoning in this succession contention—is that this judicial supervision was a necessary, indispensable, inseverable element.

The third step is what has already appeared from the passages I have read, and that is that the competence to invoke the jurisdiction of the Court for the purposes of such judicial supervision was conferred upon Members of the League, not as Members of the League, but in their capacity as members for the time being of the "organized international community", the further consequence of this submission then being that competence was intended to be available to all States of the capacity of members, for the time being, of the "organized international community"—just as the contention, for purposes of Article 6, was that administrative supervision was vested in the League as the appropriate international institution at the time of the "organized international community" and was intended to be available to any later institution of that capacity as long as the Mandate existed. I need hardly read the passages on this particular point. The point emerged to some extent from the passages I have read. I could, in addition, refer, at page 441 **(I)** of the Observations, to the third paragraph from the end of the page:

> "The 'legal interests' of the Members embraced the fulfilment of their duties as members of the organized international community and were not confined to their possibilities of material advantage in an immediate and narrow sense. The Mandate agreement, like Article 22 of the Covenant of the League upon which it was based,

> conceived of the 'interests' of the Members in terms of the fundamental interests of the international community in the achievement and maintenance of international peace and security and the promotion of human rights and fundamental freedoms."

The passage at the bottom of page 432 **(I)**, running on into page 443, which I have read, is pertinent on this point also. Then at page 443 we find that the text goes on:

> "The only question is, which representative of the organized international community does one look to, the League of Nations or the United Nations, the organ in existence when the Mandate was conferred or the organ now in existence?"

I proceed to the next section on that page, headed "Membership in the United Nations", and there we find that the passage begins with:

> "Administrative and judicial supervision of the Mandatory by the international community, as has been noted by Applicants, is a key feature of the Mandates System. It represents the 'securities for the performance of this trust' required under Article 22... Necessarily, the framers of the Mandates System entrusted such supervision to the appropriate international institutions created at the time the System itself was devised."—(*Observations*, p. 442 **(I)**.)

"administrative" to the League and "judicial" to the Permanent Court, and Members of the League then, for that purpose, got the necessary competence to invoke the jurisdiction of the Court—that is the line of the argument being put there.

And finally, at page 446 **(I)**, we find in that paragraph after the quotation from Judge Lauterpacht:

> "Hence, the authors of the Covenant endowed the members of the League of Nations, the Organ then representing the international community of civilized nations, with the right to institute the judicial proceedings."

So that then is the third step in the reasoning in support of the succession contention relative to Article 7.

The fourth step follows upon the third, and that is, that the United Nations has replaced the League of Nations for purposes of the Mandate, the United Nations now being the "appropriate international institution" of the "organized international community" and, as such, vested with the administrative supervisory power in succession to the League, and the Members of the United Nations, consequently, being vested with the competence to invoke the judicial supervision in succession to Members of the League. And that we find stated at these various pages to which I have referred. At page 442 **(I)**, where there is that reference to "the four sides of the quadrilateral jural system", we find there is a reference to the replacement of the various organs by others, and in the case of *(b)* we see that:

> "The League of Nations has been replaced by the United Nations";

and

> "*(c)* Members of the League, including Applicants, are today Members of the United Nations."

At page 443 (I), after posing the question "which [organ] of the organized international community does one look to?", Applicants proceed:

> "The majority Opinion applied the doctrine of succession and looked to the United Nations."

There is a reference to the minority Opinion and then:

> "Applicants have urged confirmation of the Majority Opinion ... since such view appears more responsive to the purposes of the Mandate." (*Observations*, p. 443 (I).)

And then at page 445 we find this stated, in the second paragraph:

> "The Court, in determining that the International Court of Justice has replaced the Permanent Court and that the United Nations has replaced the League of Nations for purposes of the Mandate, similarly applied the principle of succession, explicit in one case and implicit in the other, in order to give effect to the purposes of the Mandate.
>
> The Court recognized that the failure of the League of Nations and the Permanent International Court, as such, to endure in their original forms, is irrelevant to the fundamental principle that Respondent as Mandatory remains responsible to the organized international community for the discharge of the 'sacred trust of civilization'."

And finally, at page 446 towards the end of the reasoning:

> "Even though 'civilization' in the form of an organized international community is no longer embodied in the League, the same powers, objectives and principles are now represented by the United Nations. United Nations Members have the same essential attributes as did Members of the League, namely, membership in the organized international community and, thereby, parties to a Charter, or covenant, the purposes of which include supervision over non-self-governing territories, including trust territories and mandates.
>
> Put in the form of the analysis of Judge Lauterpacht stated above, a holding by the Court that United Nations Members have succeeded to the functions of League Members *vis-à-vis* the Mandate would be 'no more than an example of legitimate application of the principle of effectiveness to basic international instruments'."

That, then, is the line of reasoning—the four steps: judicial supervision; intended to be an indispensable feature of the Mandates system; that supervision was intended to be vested in League Members in their capacity as members of the "organized international community"; and it therefore now vests in the Members of the United Nations as members of that "organized international community".

Mr. President, I proceed now to our comment on the crucial aspects of the line of reasoning which I have just examined; first of all, as to the basic premise that Article 7 was intended to provide for judicial supervision, and for that purpose to relate to the interests of the inhabitants. That, as I have indicated already, is attacked in our Third Objection, and if that attack should be sound, then that would really dispose also of the whole premise for this line of reasoning of the Applicants for purposes of the First and Second Objections. The Applicants virtually concede that in the passage to which I have referred, where they say that if the

narrower view is taken of the legal interests of Members of the League, one could understand and possibly even admit a contention that such legal interests lapsed with the termination of the League's existence. That is at page 443 **(I)** of the Observations. But we meet them also on the common ground of the assumption that the wider interpretation is, for this purpose, to be given to Article 7. We do that for the purposes of the First and Second Objections, and for record purposes I might state that that is particularly clearly stated in the Preliminary Objections at pages 363-364 **(I)**.

The next point I want to emphasize in regard to this line of reasoning is that it seems evident, both by the way in which it is presented by the Applicants and from its very substance, that the contention of succession relative to Article 7 is dependent upon the contention of succession relative to Article 6. It must in the nature of things be so. The contention about Article 7 appears to be that the United Nations or its General Assembly has now become the appropriate organ of the "organized international community" for purposes of supervision—administrative supervision—of Mandatory administration; that happened by virtue of a succession for purposes of Article 6; and thus it is because of the United Nations now being that appropriate organ of the "organized international community" that Members of the United Nations are to be regarded as appropriate States for the purposes of invoking the judicial supervision. Thus we find also that the Applicants state, in a passage which I have already read in the Observations at page 429 **(I)**, that:

> "The interconnection, then, between Articles 6 and 7, is this: according to the Majority view of Article 6, Applicants have standing to invoke Article 7 by virtue of membership in the United Nations..."

I stress, Mr. President "*according to the Majority view of Article 6*, Applicants have standing to invoke Article 7 by virtue of membership in the United Nations", the second flowing from the first. They state at page 445 **(I)**, in a passage which I have also read, that "the United Nations has replaced the League of Nations for purposes of the Mandate", and there is that long passage at page 446 which I have read, where they indicate that Members of the United Nations have the same essential attributes as did Members of the League. Now what, on analysis, are those essential attributes? We look at the passage again, at page 446; they are said to be:

> "... membership in the organized international community and, thereby, parties to a Charter, or Covenant, the purposes of which include supervision over non-self-governing territories, including trust territories and mandates".

And why "including mandates", Mr. President? Because in that same passage there is suggested that the same powers embodied in the League are now represented in the United Nations. One can hardly see how any powers relative to Mandates could be said to be embodied in the United Nations unless it were by some process of succession relative to Article 6, in the case of this present Mandate, and similar articles in the case of other Mandates.

Therefore, Mr. President, because both in its essence and its manner of presentation, this contention of succession regarding Article 7 is depen-

dent on that regarding Article 6. It is thus for my purposes really sufficient to refer the Court back, with respect, to the full argument which I have addressed to the Court concerning Article 6, whereby I demonstrated with submission that the contention of succession in that regard is completely unfounded. That being so, all premise is removed for a contention of succession regarding Article 7. I will, however, proceed to deal with certain of the crucial aspects of the argument pertaining to succession as regards Article 7. But this is, with respect, to be viewed as being additional to the argument regarding succession which I have already addressed to the Court for purposes of Article 6.

First of all, then, for that purpose I refer again to the suggestion of inseverability or indispensability of the judical supervision, which is one of the crucial stages in the reasoning of the Applicants. My submission is that that proposition is, in regard to Article 7, even more demonstrably unfounded than in the case of Article 6, where the same suggestion of inseverability was made. The same suggestion was made regarding Article 7 in the Memorials (p. 91); it was there suggested that there could not be a Mandate without this judicial supervision, and we dealt with that suggestion very fully in our Preliminary Objections, at pages 373-375 **(I)**. We analyzed it, and we stated our contentions there as to why that suggestion was unsound. But we find that the Applicants, in their Observations, do not refer at all to the arguments which we propound at those pages in the Preliminary Objections; they do not attempt to meet them; they merely repeat their assertions of inseverability in different phraseology from that which has already been contained in the Memorials.

Mr. President, I submit that, when we look at the basic provisions in the Charter, in Article 22, and we find there that the authors of the Charter themselves did not find it necessary to provide for judicial supervision regarding Mandate administration, then it becomes very difficult for anybody to assert that this was intended to be a key feature, an indispensable part of the Mandate system. The Court will recall that there is nothing regarding compulsory jurisdiction, let alone judicial supervision of the Mandate, in Article 22 itself; the provision was made specifically by agreement between the Council of the League and the various Mandatories, and for that reason, the historians tell us, we find that Article 7, the second portion, begins with the words "The Mandatory agrees that...". That is the significance of that phraseology which is employed in this instance and not in the others. That is a special voluntary agreement entered into between the Mandatories and the Council of the League, not provided for in Article 22 itself. And it becomes difficult to see how there could then be any suggestion of indispensability. So, for instance, let us assume that during the lifetime of the League, the existence of the Permanent Court had for some reason or other come to an end, so that Article 7 of the Mandate became incapable of performance. Could anybody then have seriously suggested that that meant the end of the whole Mandate? I submit not. And yet, if this contention as to inseverability were to be regarded as sound, if it is correct to say that judicial supervision in terms of the compromissory clause must survive if any one of the portions of the Mandate is held to survive, then that must have been the consequence, namely that upon the rendering impossible of performance of the compromissory clause, say, for instance, because the Court referred to in it went out of existence, then the whole Mandate system

would fall to the ground and the Mandates would all have to be regarded as terminated.

And then we find this very significant thing. Where it is the Applicants who stress that one finds in the trusteeship system of the United Nations principles analogous to those of the Mandate system of the League, and where the arrangements as between administering authorities and the United Nations which correspond to the Mandates are called trusteeship agreements, then, if there was any conception of indispensability of judicial supervision in a system of that kind—in a system of supervision over the government of backward territories, with a view to performance of a sacred trust of civilization—then surely one would have expected that that judicial supervision would have been provided for in each and every one of these various trusteeship agreements under the United Nations. What do we find in fact? We find in the case of the present United States trusteeship of the Pacific Islands formerly held by Japan under mandate, that in the Japanese Mandate Agreement there was a provision corresponding to our Article 7—I think it was Article 7, too, in that Mandate. When the trusteeship agreement was proposed to the Security Council by the United States in regard to those same islands, there was no provision for such compulsory jurisdiction, and nobody commented about it. Nobody raised the point: "But surely this must be regarded as a key feature of this type of system of trusteeship over territories and peoples of this kind."

Similarly, Mr. President, when Australia submitted trusteeship agreements in regard to Nauru and in regard to New Guinea, we find that the corresponding Mandates in respect of these territories had contained compromissory clauses, the same as Article 7, but these draft trusteeship agreements did not contain such clauses and they were eventually adopted without anyone raising any point about this at all. This was in the General Assembly. And the omission is the more significant because of the fact that other trusteeship agreements, submitted in regard to other previous Mandated territories at about the same time as these, did contain compromissory clauses. It becomes the more significant then that nobody raised the point that: "Here are two cases of submission of trusteeship agreements and something which is to be regarded as indispensable, as a key feature of the whole system, as inseverably connected up with it, but that is omitted from these trusteeship agreements." We deal with that point in the Preliminary Objections at page 374 **(I)**, and we deal also with the point of the omission of judicial supervision from Article 22 itself, but yet we find no reply to that in the Observations of the Applicants.

I submit, Mr. President, that the Applicants fail to distinguish between the *existence* and the *justiciability* of international legal relationships. It is a very common feature, as all the Members of the Court would know, of international legal relationships, that they could exist as matters of rights, duties and obligations between States without there being justiciability of those legal relationships—special agreement, special consent to the jurisdiction of an international tribunal being required for the additional element of justiciability. And the Applicants, in suggesting that there must necessarily be justiciability of legal relationships pertaining to a Mandate, miss the point completely and their suggestion is, in my submission, without any foundation.

I deal next, Mr. President, with a portion of Applicants' argument which seeks to equate membership in the League with membership in the "organized international community", and thus to build a bridge towards United Nations membership as a substitute qualification for invoking Article 7. That argument, in my submission, is a mere device, and it is a fallacious device. I have demonstrated, with submission, the similar fallacy in the similar argument pertaining to Article 6. Here it is not difficult to demonstrate the same fallacy. We find that in the express words of Article 7, if we give them their natural meaning in the context—indeed, if we give them any meaning of which they as words may be capable—they do not refer, and they are incapable of being read as referring, to anything other than another Member of the League of Nations; they do not refer as language to anything else. If they are therefore to be taken to have the significance contended for by the Applicants, then, Mr. President, it would mean that one would have to read something by implication into Article 7, something which is not there. Therefore the argument, if it is to be sound at all, must rest on an implication as to the tacit common intent of the parties, and it must rest on a proper investigation as to such intent. The words that would have to be read in by implication would have to be something like these—perhaps somebody can think of a shorter formulation, but even though shorter the concept would have to be something of this nature: the clause would have to read—instead of "another Member of the League of Nations", one would find "another Member of the League of Nations in its capacity as a member of the organized international community for the time being, and any later member of the organized international community for the time being, whether or not such a State then is, or ever was, a Member of the League of Nations". That would be the concept to be read into Article 7 if the contention of the Applicants were to be sound. Mr. President, indeed that contention, because it includes and necessarily must include States that never were Members of the League, that conclusion is really not only a suggestion of something additional to the explicit text of Article 7; it conveys a notion which is indeed contrary to the text, in opposition to it, because the text, given its natural connotation, confines the ambit of potential adversaries in Court proceedings to League Members; it draws the line there—it provides for a *numerus clausus*, if I may put it that way—a closed circle of States who could potentially take a Mandatory to court; and the line is drawn with reference to League membership, and League membership alone. Now, if we are to read into it an implication which provides for States other than League Members to be able to invoke Article 7, that is a notion which is really contrary to the notion conveyed by the natural meaning of the text, and the contention then in effect means that the text must be taken as not giving an accurate expression of the intentions of the parties. We have seen in the analysis of the principles of interpretation, particularly those of actuality and of natural, ordinary meaning, that in order to demonstrate a proposition of this kind very special and very convincing reasons would have to be established. On analysis, Mr. President, what reasons are advanced by the Applicants, what do they attempt to establish by way of special or convincing reasons? I submit, far from the reasons which they do advance being either good or convincing, we find that they rest in the first place on the false premise of inseverability or indispensability of judicial supervision, with which

I have dealt; they involve an artificial and fallacious device of equating "Member of the League" with "member of the organized international community", and that again with "Member of the United Nations", without any enquiry into the intentions of the parties in that regard. I gave the Court examples when dealing with this same point relative to Article 6, examples demonstrating, with submission, that the mere fact that one can have a label which fits two things, one common label for the two, does not mean that when there is a contract which refers to one, that contract can also be taken as referring to the other. Because that must always remain a question of intent, and without reference and enquiry into the intent, one can have two results which are poles apart: one which obviously is within and one which obviously is outside the intention of the parties. I do not have to repeat those examples.

The Applicants do not enquire into intentions; the nearest they come to that is to refer to the principle of effectiveness, and that, in the circumstances, Mr. President, in my submission cannot assist them. They cannot invoke that principle in the sense of assisting in a choice between alternative meanings of a text because, as I have demonstrated, what they are contending for is not in the text at all, on any reading of the text. They are seeking to invoke that principle as a factor of probability to assist, together with the other evidential material, towards an implication of tacit intent; although they don't call it so, that is the effect of their argument on analysis. And when we have these other factors as to the actual contemplation of the authors of the Mandate system, the indications of actual intent, then this general suggestion regarding effectiveness cannot be of much assistance. When we have the direct evidence afforded by the fact that there is nothing in Article 22 itself concerning compulsory jurisdiction; when we have the contemplation of Members of the United Nations at the time of the trusteeship agreements to which I referred, then it must be difficult to say that there was a necessity even for purposes of effectiveness of this so-called judicial supervision, or that there was any common intent regarding that element as being of such importance, even from a point of view of effectiveness.

When we find, Mr. President, that we have a Mandate institution which is brought into existence by contract but which, according to the Opinions of the Court in 1950, could have operated internationally as between the Mandatory and all States that gave recognition to that special status of the territory and to the Mandatory's title in that regard—a circle therefore of potential interested parties extending beyond the circle of Members of the League—then we find that nevertheless, in the compromissory clause, the circle of potential adversaries in court proceedings is limited to Members of the League. That being so, how could one then attribute to the parties to the Mandate Agreement a contemplation that there may one day be a new international organization which may replace the League after its as yet uncontemplated dissolution, and that there must now be a tacit agreement upon the fact that if that new organization would resemble the League to the extent of possibly fitting the name of "representative of the organized international community", then members of that organization must be regarded as being included in the consent to jurisdiction contained in Article 7; surely it is a most far-fetched proposition, totally unrelated to any realistic view as to the probable intent, the probable contemplation, of the parties to the Mandate Agreement. I cannot imagine how the bystander, to

which we have referred, could possibly have expected any positive answer, any harmonious answer, from the parties to the Mandates Agreement if he had posed a question of this kind to them. Jurisdiction can exist by virtue of consent, actual consent, on the part of the respondent State, and there is no substitute for it. This suggested application of the principle of effectiveness in this instance would really, if acceded to, result in a situation whereby jurisdiction is found to exist in a case where there is no satisfactory demonstration of actual consent. These are my submissions regarding this line of contention of the Applicants.

Mr. President, in the development of their contentions regarding succession, the Applicants make a submission, apparently by way of analogy, regarding Article 37 of the Statute of the Court, on the question of succession as between Courts—between the Permanent Court and this Court—and they appear to suggest that whereas that succession was expressly provided for in Article 37 of the Statute of the Court, and that that express provision was relied upon by this Court in its Opinion in 1950, the Court might well have come to the conclusion that there was implicit succession which would have operated even in the absence of Article 37. That is how I understand what they suggest at the bottom of page 443 **(I)** of the Observations. They say:

> "The Court held that the reference in Article 7 of the Mandate to the Permanent Court of International Justice should be replaced by reference to the International Court of Justice. Although stressing Article 37 of the Statute of the Court, which makes specific provision for the substitution, there is excellent authority that even in the absence of Article 37 the Court might well have ruled the same way."

That "excellent authority" is said to be two-fold. One is an extract from the Report of Committee I of the San Francisco Conference, the extract being cited at page 444 **(I)** of the Observations; and the other is an extract from the separate Opinion of Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender in their joint dissenting Opinion in the *Aerial Incident* case. Now, Mr. President, as a matter of fact, the extract from the Report of the Committee is also quoted in that very joint dissenting judgment in the *Aerial Incident* case, but it is quoted more fully than by the Applicants. The Applicants quote the second portion of the passage as cited in the joint Opinion, and they also omit a word after the words "in a sense". On reference to the original, one finds that the word omitted is "therefore". They indicate that there is an omission, but I am merely stressing that the word omitted is "therefore". The word "therefore" is found in the context to refer back to what is stated in the previous paragraph, that paragraph being one which is quoted in the joint Opinion in the *Aerial Incident* case. Now I would like to read that to the Court. The previous paragraph states:

> "The creation of the new Court will not break the chain of continuity with the past. Not only will the Statute of the new Court be based upon the Statute of the old Court, but this fact will be expressly set down in the Charter. In general, the new Court will have the same organization as the old, and the provisions concerning its jurisdiction will follow very closely those in the old Statute... To make possible the use of precedents under the old Statute, the

same numbering of the Articles has been followed in the new Statute." (*Aerial Incident* case, p. 159.)

One sees then the significance of the word "therefore" in the next passage, which is:

"In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced." (*Aerial Incident* case, p. 159.)

The "therefore" indicates what that sense is, and it becomes perfectly plain from the previous paragraph that there was no suggestion of any general succession in law. It was only in the sense of having a Statute which is based upon the old one, having the same organization, having provisions following very closely those of the old Statute and having the same numbering of articles; it is in those particular senses that the new Court may be looked upon as a successor of the old Court, but in those alone, as is emphasized by the very final sentence:

"The succession will be explicitly contemplated in some of the provisions of the new Statute, notably in Article 36, paragraph 4 (which subsequently became paragraph 5), and Article 37." (*Aerial Incident* case, p. 159.)

In other words, what the Committee intimates here is that in these general, practical, broad respects it will be possible to look upon the new Court as, in a sense, a successor of the old one, and in addition, there will in certain other respects be express provision for succession in terms of those express provisions. The Committee quite clearly saw that there was no question of a general succession in the sense, for instance, that declarations relating to the jurisdiction of the old Court could, without new agreement in that regard, be regarded as relating to the new Court, or that provisions in treaties or conventions in force referring to jurisdiction of the old Court could now be read as referring to jurisdiction of the new Court. The Committee stressed in its Report the necessity in that regard of having the express provisions of Article 36, paragraph 5, and Article 37. Indeed, by the wording of those two Articles, the Court will recall that the fresh consent given to those Articles by the signatures to the Charter, that that would bring about fresh consent only as between Members of the United Nations, and only to the extent provided for in the Articles, and it is for that reason that in the Report of the Rapporteur of the Committee we find the following:

"Acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other States, or between other States, should also be covered in some way, and it seems desirable that negotiations should be initiated with a view to agreement that such acceptances will apply to the jurisdiction of the new Court. This matter cannot be dealt with in the Charter or the Statute, but it may later be possible for the General Assembly to facilitate such negotiations." (*U.N.C.I.O. Docs.*, No. 13, at pages 384 to 385 (also cited in the *Aerial Incident* case at p. 180).)

It is therefore quite clear what the contemplation of this Committee was. There was no contemplation of an implicit succession; on the

contrary, there are all these proposals for making explicit provision for succession where succession was desired.

The second authority relied upon is a passage from the joint Opinion in question in the *Aerial Incident* case. There too, Mr. President, if that extract is read with other aspects of the Opinion, it becomes quite clear that there was no suggestion on the part of the learned Judges that there could be a succession in the absence of express provision therefor. One finds, for instance, in a passage of the Opinion at page 165, dealing with the provisions of Article 36, paragraph 5, concerning declarations, that they said that Committee IV/1 was "concerned with the drafting and adoption of a formula which would provide for [the] continuing validity" of declarations relating to the Permanent Court. I skip somewhat, and I read further at that page:

> "It was the attachment of the declarations to the new Court which was considered essential and it was that object which prompted the adoption of the formula provided in paragraph 5 of Article 36 in order to ensure the continued validity of those declarations." (*Aerial Incident* case, p. 165.)

It is a clear indication of the necessity of the express provision in Article 36, para. 5, in the contemplation of the learned Judges. Further, at page 168, we find it stated again that:

> "The object of paragraph 5 [of Article 36], clearly expressed in the course of the preparatory work as cited, was precisely to prevent these declarations from lapsing with finality for all purposes."

And further, at the same page:

> "The object of paragraph 5 was to secure succession in the sphere of the obligatory jurisdiction of the Court."

There is not the least suggestion of a contemplation that the succession could have been implicit, could have taken place in the absence of the express provision. The same contemplation regarding Article 37 is shown in the passage which we read at page 181 of the Opinion, which is as follows:

> "In particular, it is useful to draw attention to the successive drafts of Article 37, which was intended to serve a general purpose similar to that underlying paragraph 5 of Article 36." (*Aerial Incident* case, p. 181.)

And then, at page 182 of the Opinion, we find this:

> "In relation to both provisions [Articles 36 (5) and 37] the requirement of consent is supplied by the State concerned accepting membership of the United Nations—an event which makes it a party to the Statute—and by its formal undertaking to observe the obligations of the Charter, of which the Statute is an integral part." (*Aerial Incident* case, p. 182.)—

that, therefore, being the express acceptance of the provision for the succession. It is quite clear therefore that the authorities cited by the Applicants do not bear out their proposition regarding Article 37. I may just add a reference to the separate Opinion of Judge Carneiro in the *Ambatielos* case, 1952. At page 54, he stated:

"Even when the organ which was formerly competent has been abolished, its powers cannot be regarded as automatically transferred to the new organ which replaces it. Thus, in order that this Court might inherit the powers of the Permanent Court of International Justice, it was necessary that this should be expressly laid down in Article 37 of the Statute."

[Public hearing of 9 October 1962, afternoon]

Mr. President, I come now to deal with the 1950 majority Opinion regarding Article 7 of the Mandate.

That Opinion contained a finding to the effect that Article 7 must still be regarded as being in force. The only reasoning specifically indicated as being applicable on this point is to be found at page 138 of the Opinion and is stated in a single sentence. The sentence reads:

"Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions." (*1950 Opinion*, p. 138.)

The expression "those provisions" in the context in the English, is somewhat ambiguous. It might refer either to the provisions of Article 7 itself or to the other provisions—Article 37 of the Statute and Article 80 of the Charter—to which the Court referred. But the intent appears to be to refer to the provisions of Article 7: that seems to be the meaning borne out by the French text.

This, Mr. President, is the only reasoning expressly directed to this particular point. But the Applicants in their Observations suggest that the Opinion in 1950 regarding Article 7 has to be understood as being based upon the finding which the majority of the Court had already made as regards succession for purposes of Article 6. The Court did not specifically indicate whether that was the *ratio* for its finding, but on analysis it seems that the suggestion may well be correct. I cannot say it is; it *may* be. The two provisions that are referred to in this one sentence of reasoning, Article 37 of the Statute of the Court and Article 80, paragraph 1, of the Charter, do not deal at all with the question which is posed by the phrase "another Member of the League" in Article 7, or with the difficulty that arises from the fact that there now are no longer any Members of the League. Article 37, as the Court knows, provides for a substitution of the Courts, and Article 80, paragraph 1, is to the effect that nothing in Chapter 12 of the Charter shall be construed as in or of itself altering the rights of any States or peoples or the terms of certain instruments. So that neither of them bear directly, or even indirectly, on this question of a substitution of anybody else for "another Member of the League of Nations" in Article 7 of the Mandate Agreement. It may conceivably, therefore, have been the underlying idea in this Opinion that the succession, which the Court had already found in regard to Article 6, could also supply an answer in regard to Article 7, although the Court did not say so specifically. If that should be the correct interpretation of the majority Opinion, then it follows that all

the argument which I addressed to the Court regarding Article 6, and particularly the argument addressed to the Court relating to the material now before the Court which was not before the Court in 1950 relative to Article 6, becomes of the utmost importance also in the evaluation of the 1950 Opinion regarding Article 7, and in considering the question whether this Court ought now to depart from the conclusion arrived at in 1950 regarding Article 7.

The Applicants say, in their Observations at page 439 (I), as follows, at the top of the page:

> "Respondent has failed to set forth any arguments not previously advanced by it in the proceedings leading to the Advisory Opinion of 1950 which should alter the Court's ruling that Article 7 remains in effect and the necessary corollary that to be effective there must exist States with the capacity to invoke it."

But if Applicants are right in their own suggestion that the Court's finding regarding succession for purposes of Article 6 underlay its finding regarding Article 7, then all the new information I brought before the Court for purposes of Article 6 is relevant also to the Opinion in regard to Article 7. In any event, we point out in the Preliminary Objections, and this is nowhere specifically dealt with or disputed by the Applicants, that in the first place there was hardly any argument in 1950 about the question of Article 7. That may well have been because of the fact that no question pertaining to jurisdiction was specifically formulated as a question for the Court's attention. The Court eventually found that that was a matter with which it ought to deal as being covered by the general question pertaining to the status of South West Africa and the international obligations of the Union of South Africa in that regard, and it answered this question as being covered by those general questions. But it was not formulated as a specific question; and indeed we find in the argument that Dr. Steyn stated, as if it were a self-evident proposition, that on dissolution of the League there were no longer any Members of the League and therefore Article 7 could no longer be invoked. And that was the sum total of the argument on that particular point.

Dr. Steyn was not confronted with any suggestion of a succession for purposes of Article 7. He was not confronted with any contention of a "descriptive meaning" to be assigned to the expression "another Member of the League of Nations" in Article 7, and he was not confronted with any suggestion of a "carry-over" for purposes of Article 7, and therefore it was quite impossible for him to deal with any of those suggestions which had never been put to him.

The issues in that regard, therefore, were never canvassed, and the Court was not put in the position in which this Court is now, of having a full and a detailed analysis of the meaning and of the implications of the expression "another Member of the League of Nations", not only in Article 7 itself but in all the other Mandate instruments and throughout the Covenant of the League. It was not in the same position as regards a full analysis of the concept of succession and the underlying principles which are invoked in support of it.

Moreover, as we have noted, and we stress in the Preliminary Objections, the majority did not indicate any reasoning other than that contained in the one sentence relative to its finding for the purposes of Article 7. The Opinion was, to the extent we indicated in the Pre-

liminary Objections, also on this point critically received by scholarly writers. We deal with these matters fully in the Preliminary Objections at pages 368 (I) and 373.

Therefore, Mr. President, in all these circumstances my submission is that also in regard to Article 7 we have made out a case not only for *de novo* consideration of the whole question regarding jurisdiction in terms of Article 7—*locus standi* in terms of Article 7—but also, that having regard to all the evidential material now before the Court and the full argument, full examination of all the legal propositions in regard thereto, this Court could now follow the exceptional course of coming to the conclusion that it is not to regard itself as bound in any way, in law or as a matter of precedent, by the Advisory Opinion of 1950, and that it should come to its own conclusion in that regard in order to do justice between the parties.

My submission will be that the Court will find that it will not follow the majority Opinion in that respect, or the minority Opinion with which I dealt before and which was based on the "descriptive meaning" interpretation.

Mr. President, although I have dealt very fully and thoroughly with the 1950 Opinions in regard to the various issues now before the Court, the Court would have noticed that I have hardly referred at all, except on two isolated points, to the Opinions of 1955 and 1956. That is because of the fact that both the later Opinions were, by the form of request addressed to the Court by the General Assembly, based on the prior assumption of the correctness of the 1950 Opinion regarding succession—or, shall I say, regarding the obligation on the part of the Mandatory now to report and account to the General Assembly of the United Nations in substitution for the Council of the League. That is so very evident from the wording in respect of both the requests addressed to the Court. First, in the case of the 1955 Opinion on *Voting Procedure* (I am reading from the official report, at page 69), the operative portion of the Assembly resolution reads:

> "*Requests* the International Court of Justice to give an advisory opinion on the following questions:
> *(a)* Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950..."

Then follows the suggested rule, and the second question is:

> "*(b)* If this interpretation of the advisory opinion of the Court is not correct..."

Then follows a further question as to what voting procedure should be followed. In fact the Court, in each instance—all the Members of the Court—found an affirmative answer relative to the first question, and the second therefore fell away. The very basis of the question to the Court was therefore to interpret the 1950 Opinion of the Court in this particular respect and to determine whether the rule on voting procedure corresponded to a correct interpretation of that Opinion. The Court in fact said so in its majority Opinion, at page 71, that it was to confine itself to that basis:

"The scope of Question *(a)* is thus limited by the wording used and by the reference to the General Assembly's acceptance of the Opinion previously given by the Court. It is therefore essential that the Court should keep within the bounds of the question put to it by the General Assembly." (*1950 Opinion*, pp. 71-72.)

The same applies, even more specifically as far as the wording is concerned, to the Advisory Opinion of 1956 on the *Admissibility of Hearings of Petitioners by the Committee on South West Africa.* The operative portion of the resolution reads as follows (at p. 24 of the I.C.J. Report):

"*Requests* the International Court of Justice to give an advisory opinion on the following question:

'Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution ... to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?'."

Again, the question is simply: "Is it consistent with the advisory opinion?" And although there was a division of opinion in the Court—between the Members of the Court—as to the correct answer to this question, the opinions in both respects proceeded on the basis of the correctness of the 1950 Advisory Opinion and on the necessity of interpreting it for the purposes of answering this question.

The fact that that was so is particularly forcibly illustrated by the position of Judge Read. It will be recalled that Judge Read was one of the two Judges who gave a minority opinion in 1950 on the question of administrative supervision of the Mandate. He came to the conclusion that that supervision had come to an end with the dissolution of the League, and that there had been no succession or any other process by which the United Nations, or any organ thereof, was substituted for the Council of the League as a supervisory organ. That was his opinion in 1950. But in 1956, when the Court divided on this question as to oral hearings of petitioners and as to how it should be answered, the majority of the Court gave an answer which might be regarded as, in practice, more favourable to the oral hearings of petitioners and the minority gave an opinion which was less favourable in that regard. But Judge Read joined the majority. In other words, to him it was quite clear that his function now was not to reconsider the question whether there had been any succession or any similar process whereby there was a substitution of supervisory organ and an alteration in our obligation in that regard; his function was purely to interpret the majority opinion on a particular point raised in the request of the Assembly. Therefore, Mr. President, both the opinions having proceeded on the basis of the correctness of the 1950 Opinion in that respect, it does not, in my respectful submission, serve any useful purpose to analyze these opinions, except on the specific points that I have discussed here and there. I may point out further that in the 1956 Opinion there appears to have been a difference of opinion as to the correct interpretation of the 1950 Opinion on the question of Article 6 of the Mandate. The majority indicated in their reasoning that they considered that the 1950 Opinion on that point was founded on an idea of succession, of powers going over to the United Nations—powers of supervision—whereas the minority considered that that was not so,

that it was rather a question of a maintenance of a *status quo*, of an existing situation, and that for the purposes of maintaining that existing situation it was important to have regard *inter alia* to the willingness expressed by the Union of South Africa to regard itself as continuing to exercise its Mandate, to continue to administer the territory in accordance with the provisions of the Mandate, and to "continue to render reports to the United Nations". I have already pointed out that in this latter respect the reference rested on a wrong factual premise, that there was in fact never an expression of willingness on the part of the Union Government to continue to render reports to the United Nations, if by that is understood reports in pursuance of Article 6 of the Mandate relative to compliance or otherwise with the Mandate obligations. Otherwise, that difference of opinion was purely related to the particular issues in the case before the Court and does not appear to be of assistance to the reasoning or the argument in the present case.

I have come, therefore, to the end of the issues regarding the suggested succession for purposes of Article 7, and I submit that, for the reasons that have been stated, those contentions of the Applicants regarding suggested succession for this purpose are not sound and should not be accepted by the Court.

I proceed now to deal with the second ground advanced by the Applicants as to why competence to invoke Article 7 could still exist on the part of States who are not possessed of the qualification prescribed therein, namely membership of the League. This second ground which the Applicants advance is the so-called "carry-over principle". We find that dealt with at pages 446-448 (I) of the *Observations*.

Now, Mr. President, may I first read at page 446 the broad concept of this carry-over principle as it is stated by the Applicants themselves in application to the case of the League and its Members:

> "There is at the very least a *de facto* carry-over of the League's responsibilities to the extent that an important function of the League continues beyond the League's formal existence."

The Applicants do not say here what function they mean, but ostensibly they mean the function of supervising Mandatory administration.

> "Such a *de facto* carry-over not only justifies the presence of Respondent in the Mandated territory, but it also keeps alive the legal interests of the League and its Members in the Mandate. Hence, States, such as Ethiopia and Liberia, which were members of the League at the time of the League's dissolution, remain within the description of 'another Member of the League' for purposes of the Mandate." (*Observations*, pp. 446-447.)

The next paragraphs proceed to explain what is meant by this so-called principle of "*de facto* carry-over"—*de facto* survival of an entity which has been formally dissolved. The Applicants point there to the statutes of certain of the States of the United States of America, by which statutes express provision is made to enable a dissolved corporation to continue *de facto* in existence until it has wound up its corporate affairs. That is the first group of statutes referred to; the description of it is in the Observations: "Thus, in many States of the United States of America, a dissolved corporation remains *de facto* in existence until it winds up its corporate affairs." Secondly, the Applicants state: "Other States of the United

States enable persons who were corporate directors at the time of a corporate dissolution to sue as trustees on any claim of the corporation." Again there is a reference to a number of specific statutes. And the Applicants proceed:

> "This is but another way of recognizing the continuing vitality of the rights and obligations created by the corporation prior to its dissolution. The 'carry-over' principle of dissolved corporations is implicit in the rule that suit may be brought on behalf of the defunct corporation only by former directors." (*Observations*, p. 447 **(I)**.)

Now, Mr. President, in my submission the briefest study of these statutes to which reference is made by the Applicants by way of example, very clearly shows the following: in the first place that this so-called "carry-over principle" does not exist; that in so far as one can speak of a "carry-over", it operates by virtue of express provision to that effect in each one of these statutes: that is why it is possible to have a "carry-over". It is a similar provision as we know, providing for claims of a company to be brought by a liquidator, for instance, for purposes of liquidation. In some cases in these statutes one finds the arrangement that a former director fulfils the function which a liquidator might fulfil under other circumstances. There are various arrangements pertaining to the various types of companies, contained in the various specific types of legislation for the regulation of company affairs. But in so far as there is a keeping alive of rights and obligations on the part of the defunct company, that is so, not because of any principle which recognizes a continuing vitality of those rights after the corporate existence has come to an end, but because of specific and precise provision in a statute to the effect that that will be so for the purposes of liquidation: so that in so far as there may have been a dissolution of the company to a certain extent before the liquidation process has been completed, the liquidation process itself is protected from the effect of that dissolution.

That is the first point that emerges. The second point is that in each case the provision enables acts to be performed "on behalf of the defunct corporation"—not on behalf of its former members, but on behalf of the corporation itself, in pursuance of rights that had been held by the corporation, and not in pursuance of individual rights of its former members. And thirdly, we find that in each case the provision has a limited purpose; it exists purely for the purpose of the winding-up of the affairs of the corporation, and for no other purpose whatsoever.

Therefore I submit that the analogy which the Applicants seek to draw from these provisions and the case to which they seek to apply it—the case of the exercise of a competence to invoke compulsory jurisdiction of a court in terms of Article 7 of the Mandate Agreement—that that analogy is completely without foundation.

I could now refer—on the points of distinction that I have mentioned—to the provisions of the statutes. We find on the first one, namely that in each case there is express provision for the so-called carry-over—we find that there are, broadly speaking, two methods of providing for liquidation. One is this: that what is envisaged in the legislation is that a certain event occurs—lapse of time, or an order of court, or something similar—which has the effect of dissolving the corporation. But then there is specific provision to exempt from the effect of that dissolution the corporate existence for the purposes of liquidation; there is an express

saving, then, of the corporate existence of the corporation, and provision is made for the necessary steps to be taken for purposes of liquidation. In other instances there is not deemed to be a dissolution at the liquidation stage; there is merely a cessation of ordinary business. There may be what is called a "provisional dissolution", but the final dissolution does not occur until there has been a complete liquidation. I could refer the Court to examples of all these classes of provision.

I refer to the California statute, the very first one in footnote 1 at page 447 **(I)** of the Observations. Here we have, on the first page, Chapter V, Section 5400, headed "Purposes for which Continued", and the Section provides:

> "A corporation which is dissolved by the expiration of its term of existence, by forfeiture of existence, by order of court, or otherwise, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge, obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof."

Clear and express provision, therefore, that despite dissolution in other respects, it nevertheless continues to exist for the purpose of winding up its affairs and attendant matters, but not for the purpose of continuing business, except so far as is necessary for the winding up thereof.

There is a rather interesting annotation, a reference to American case law in a footnote at the next page; it is an annotation to this Section 5400, and the reference is to a case of Defence Supplies Corporation *v.* Lawrence Warehouse Company. There the court is reported to have said:

> "... But a time-honoured feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing."

That emphasizes the point, Mr. President, that what is required here "is a statute so providing", emphasizing the complete absence of a "carry-over principle" such as is contended for by the Applicants.

That was an example of the type of case where there is a *prima facie* dissolution but then an exemption as regards the processes of liquidation, the company being kept corporately in existence for that purpose and arrangements being made for that purpose. An example of the other class will be found in the Louisiana statute, also cited in a footnote—West's *Louisiana Statutes*, referred to in footnote No. 2 at page 447 **(I)**. There we find provision for liquidation by the court on petition based on a resolution, a resolution authorizing directors or shareholders to sign and present in the name of the corporation a petition to court praying for dissolution. And there is specific provision that where a corporation is being liquidated —it is said that thereafter the liquidation proceedings shall be conducted under the supervision and orders of the court. Where a corporation is being liquidated and dissolved out of court, the liquidator appointed by the shareholders, unless so forbidden by the resolution appointing them, may at any stage of the proceedings by a petition apply to court. So what we can have here is that in some cases directors may be authorized to

act as liquidators, or a shareholder or shareholders, and in other cases a liquidator may be appointed by the court.

And then there is this specific provision in Section 62, page 319 of this photostat which is filed with the Court:

> "Corporate existence continues until the certificate of dissolution is issued by the Secretary of State. At any time before termination of corporate existence, a voluntary dissolution may be revoked in the following manner..." (West's *Louisiana Statutes Annotated*, p. 319.)

But the specific provision is that corporate existence continues until this certificate of dissolution is issued by the Secretary of State, and that, according to these other provisions, takes place only at the end of the process of liquidation. Indeed, earlier on in that same Section 62 the provision is "When a corporation has been completely liquidated..."; it says "A. If the proceeding is subject to the supervision of the court, the court shall make an order declaring the corporation to be dissolved". In other words, this is a case where the dissolution itself is withheld until the process of liquidation has been completed. And secondly: "If the proceeding is out of court, the liquidator shall sign and acknowledge a certificate stating that the corporation has been completely liquidated and is dissolved"—so that at that stage only does the dissolution properly take effect, and in the meantime there has been a corporate existence because it has never been terminated for purposes of the liquidation.

The Statutes to which I have referred, of California and Louisiana, merely serve as examples of the various types of cases which we find. They also serve as examples out of the first two groups referred to by the Applicants at page 447 **(I)**. The same situation, as dealt with in them, emerges from all the other Statutes; one gets the same types of variations —sometimes a provision is for a trustee, sometimes it is for a shareholder, sometimes for a director, sometimes for a liquidator, but in all cases the keeping alive of the corporate existence of the corporation for the purposes of liquidation is *expressly achieved*. The third type of legislation to which reference is made by the Applicants is this—we find it at page 447. They say:

> "Civil law countries have similar legislation, which keep alive and carry-over the legal existence of rights and duties of dissolved entities." (*Observations*, p. 447 **(I)**.)

There too, merely as an example, I refer to the Argentina Code of Commerce, Article 435. We find that in footnote No. 3; it reads as follows:

> "The [dissolved] corporation is considered existent, only for the purpose of its liquidation. The use of the corporate name by the liquidator empowers him only to liquidate and to contract obligations which are a natural and immediate consequence of the liquidation."

So, again, express provision for the corporation to be considered existent but only for the purposes of its liquidation. And, there again, that type of example is found repeated in all the other statutory provisions, not in exactly that form but the principle remains the same, in the sense that there is no principle, as contended for by the Applicants: the "carry-over", where necessary, is achieved by express statutory enactment, and the very fact that so many different forms exist, different formulas, different ways of dealing with such matters specifically and

expressly in the Statute, indicates the total absence of any principle in that regard.

Secondly, Mr. President, even if, by any stretch of legal adaptation, one could formulate a principle of international law from these municipal legislative provisions, then surely the circumstances to which the legislative provisions apply must show some analogy with the circumstances to which it is now sought to apply such a principle. The analogy, in my submission, fails altogether for various reasons. In the first place, as I have already stated, each one of those provisions to which the Applicants refer enable acts to be performed on behalf of the defunct corporation only, and they do not embrace acts in furtherance of the interests of former members of the corporation or of some other corporation. Now let us see what the Applicants seek to do here. Here, in instituting these proceedings, they do not claim to be acting on behalf of a defunct League of Nations. On the contrary, they claim to be exercising their own rights, as they say, as members of an "organized international community"; rights which are at the same time duties to see that a sacred trust is performed; but *their* rights, not those of a defunct League. And, indeed, in the Observations at page 456 **(I)**, they introduce also further rights and interests which they claim to be representing. In dealing there with another aspect of our Objections, they say in the second paragraph, at page 456:

> "In disputing and negotiating with Respondent in the United Nations during the past several years, Applicants, therefore, have been upholding their own legal interests in the proper exercise of the Mandate; but they have been doing more than that. They have *also been upholding the collective legal interest of the Members of* the United Nations and the interests of the Organization itself. In instituting these proceedings, Applicants have moved to protect not only their own legal interests but the legal interests of the United Nations (which, itself, may not be a party to a contentious proceeding), as well as the legal interests of every other Member State similarly situated."

So there the analogy fails. The next aspect in which it fails is that the legislation provides for the carry-over of the special powers, the special extension of corporate existence for, one purpose, and one purpose only, and that is the winding up of the affairs of a dissolved corporation so as to bring it completely to an end, and not the indefinite continuation of the activities of the dissolved corporation as if there had been no dissolution. In other words, the idea is to bring about a liquidation of legal rights and interests of such corporations and not to keep them alive. But now, what are the Applicants seeking to do? They are not seeking to perform an act with a view to liquidation of the League so as to bring its corporate existence and its affairs completely to an end; they are seeking to keep alive indefinitely supervision of a particular kind over Mandatory administration; they want to keep alive that supervision as if there had been no dissolution of the League; they want to go on being regarded as Members of the League for that particular purpose, although there has for a long time been no League and although there have for a long time been no Members of a League. It is an activity which they had as Members of the League, which was available to them during the lifetime of the League, that is what they wish to carry on;

they are not seeking to liquidate, to bring to an end League activities. Therefore, again, the analogy fails.

Mr. President, I submit that when we go to the foundation of this "carry-over" suggestion, it comes down to the same principle that we have been discussing before, and that is the question of the effective intent of the parties that brought about the relevant arrangements. A "carry-over" of the nature contended for by the Applicants could operate only if there was an effective intent in law to bring that about. The "carry-over" in the case of these municipal law provisions operates by reason of the effective intent of the legislature in those particular cases, the effective intent to which expression is given in the legislation, so as to have effect in law. That is what brings about such a "carry-over". In the case of an organization like the League which did not have legislation governing it, but whose Covenant was derived from an international agreement, as a constitutive instrument, there the effective intent would have to be either that of the founders of the League as expressed in the Covenant itself, or, in the absence of specific provision of that kind in the Covenant, there would have to be *ad hoc* resolutions and arrangements by Members of the League, by its competent organs, to bring this about. We know that, in fact, there was in the case of the League no provision in regard to liquidation—no detailed provision at any rate—in the Covenant, and that special provision therefore had to be made at the last session of the League. It is, therefore, to the arrangements made at that stage that we have to look in order to find whether there was any effective intent to bring about such a carry-over as is suggested by the Applicants. And we find, Mr. President, that although very specific provision was made for all the practical aspects of the liquidation, although express provision was made for functions and activities to be carried on after the League's dissolution, to be carried on by another organization, namely the United Nations, and although express provision was made in regard to the future of Mandates after the dissolution of the League, in not one of these instances was there any provision which could effectively bring about a carry-over of the nature contended for. And the omission is a very significant one. Indeed, from the very wording of the last resolution of the League regarding Mandates, it is clear that there could have been no such intent because there, in the third paragraph if I remember correctly, it is recorded that the Assembly recognizes that the League's functions with regard to Mandates have come to an end. Surely one would not expect such a recording in that resolution if there was any intent to provide for a continuation, for a limited purpose and a limited time, of a function with regard to Mandates, for that to be exercised by way of a carry-over by ex-Members of the League.

One finds indeed, Mr. President, in the very final resolution of the League, as adopted on 18 April 1946, that there is express provision for dissolution of the League and for liquidation, and then for a carry-over of a limited nature for the purposes of that liquidation. I refer to the *League of Nations, Official Journal, Special Supplement* 194, at page 269. The first clause of the resolution reads:

> "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."

So there we have an example of a dissolution of the corporation, with the express exception for the purposes of liquidation. The second sub-paragraph of the first clause reads:

> "The liquidation shall be effected as rapidly as possible and the date of its completion shall be notified to all the members by the Board of Liquidation provided for in paragraph 2."

Paragraph 2, then, reads:

> "The Assembly appoints the persons named in the Annex to form a 'Board of Liquidation', hereinafter called the Board, which shall represent the League for the purpose of effecting its liquidation. Subject to the provisions of this resolution and other relevant decisions taken by the Assembly at the present session, the Board shall have full power to give such directions, make such agreements and take all such measures as in its discretion it considers appropriate for this purpose."

So here we have a complete provision for a real carry-over for the purposes of the liquidation of the League, but nothing relating to Mandates or functions in regard to Mandates; and one would, indeed, not expect it here because there was a special resolution regarding Mandates. The final Article of this resolution, No. 21, is to be found at page 284 of the *Special Supplement*, and it reads as follows:

> "On completion of its task, the Board shall make and publish a report to the governments of the members of the League giving a full account of the measures which it has taken and shall declare itself to be dissolved. On the dissolution of the Board, the liquidation shall be deemed to be complete and no further claims against the League shall be recognized."

There we find everything provided for in regard to liquidation and a closing date on which that liquidation of the League shall be deemed to be complete.

Mr. President, I submit that the Applicants really therefore are begging the question when they say that there is at least a *de facto* carry-over of the League's responsibilities to the extent that an important function of the League continues beyond the League's formal existence. If they mean by that "important function" the exercise of supervision through this form of competence to invoke the compulsory jurisdiction of the Court, in order to substantiate their proposition they would have to refer to effective intent on the part of the League to bring that about, and they do not even attempt to do so. All the indications of what took place at the last meeting of the League Assembly militate against there having been any intent to achieve such a carry-over. Such a carry-over with regard to competence to invoke Article 7 was obviously not regarded as a fit subject for a carry-over in terms of the resolution to which I have just referred dealing with the actual liquidation. The resolutions designed to facilitate the future exercise of powers, functions and activities previously exercised by the League were confined to non-political functions and they were confined to possible assumption thereof by the United Nations. The resolution on Mandates made no provision regarding future supervision of Mandatory admini-

stration, contained no reference to it at all, or to rights in general then vested in the League Members, or the competence in particular of such Members to invoke compulsory jurisdiction. All those things remained unsaid. And particularly in view of the recognition that the League's functions with respect to Mandates would come to an end with its dissolution, it seems inconceivable that if there had been any intent to achieve such a carry-over it would not have been expressly provided for.

I proceed, therefore, to the next statement of the Applicants in support of their carry-over argument. We find that in the Observations at page 447 (I):

> "An analogous principle of municipal law may be found in the widely held doctrine that legal relationships established under a statute by statutory authority survive the expiration of the statute or statutory authority in the absence of provision to the contrary. Particularly is this so when a saving clause is employed in the legislation repealing the statute or dissolving the statutory authority."

Now those two statements, Mr. President, in my submission, are logically inconsistent. If there should be a widely-held doctrine that legal relationships established under a statute by statutory authority survive the expiration of the statute or statutory authority, then why would a saving clause be necessary to bring that about, to bring about their continued existence? A saving clause may sometimes by employed *ex abundanti cautela*, through a surfeit of caution, in order to make quite sure that a certain result does not follow. But its normal purpose is exactly to prevent, in a specific instance, a consequence which would otherwise follow from the statute. And, therefore, if the normal consequence of repeal, or expiration, of a statute is to leave alive relationships established under that statute, then one would never require a saving clause to keep those relationships alive. Therefore, the very fact that saving clauses are employed for such a purpose tends to refute the existence of any such principle as is suggested.

In fact, there is no such principle. It is quite true that in municipal law the repeal of a statute, or the termination of a statutory authority, does not always result in termination of legal relationships which have been established in pursuance of the statute or through the agency of that statutory authority. Very often vested rights do come into existence and they are not affected by repeal of the statute or the termination of the authority. One can have a statute providing for expropriation for certain purposes and for a board that would supervise the expropriations, decide whether they were warranted and determine compensation. There may be expropriations which are completed, the compensation may have been paid, transfers may have been registered in countries where there is a system of registration, or conveyances may have been made in the other countries, and the whole transaction may have been completed. Then that would certainly not be interfered with by the eventual repeal of the statute or the termination of the existence of the statutory authority.

But whether that would be so or not must depend on the circumstances of each particular case. It must again be a result of applying the effective legislative intent to the particular situation with which one is dealing. For that purpose, it is necessary to have regard to the nature and the

content of the existing relationship on the one hand and to the intent and the effect of the repealing statute on the other hand. If one finds that the nature of the existing relationship is such that it is completely dependent upon the operation of the statute or the existence of the statutory authority, then obviously the repeal of that statute, or the termination of the existence of that statutory authority, must automatically result in the end of that legal relationship, unless it is specially kept alive—just as the opposite may be true, that if there is no dependence upon the continued existence of the statute or the authority, then the repeal or dissolution would not affect the continued existence of the particular relationship, again in the absence of specific provision to the contrary.

Therefore one cannot generalize in the manner in which the Applicants suggest. The question is one for interpretation in each particular instance. If there is a provision in a statute, for instance, obliging the citizens of a particular region, or of a particular age group, to submit themselves for active training every Saturday then they are under an obligation —that is the legal relationship—to offer themselves for training at the particular institute, on every Saturday. But as soon as that is repealed then that obligation falls away—that is the end of the legal relationship, unless it should specifically be kept alive for a group that has just been formed and has not completed a certain course of training.

One can quote all these examples, but there is no principle involved except the principle of giving effect to the legislative intent.

And when we look now at the situation regarding Article 7 of the Mandate, it corresponds to the type of case that is dependent upon the continued existence of the organization, in this particular case. By reason of the agreed content of Article 7, its operation was made dependent upon there being another Member of the League to invoke it, and therefore dissolution of the League and cessation of all memberships must necessarily result in that clause becoming inoperative, in the absence of some specific provision, some special provision, keeping it alive in some other form than before, or on a new basis. Therefore that generalization does not assist the Applicants.

Nor does the following one assist them, Mr. President. I read again from page 447 **(I)**:

> "Rights and obligations—according to which property may have been exchanged, or upon which promises may have been made, or by which a fiduciary may have been entrusted with property not his own—are not considered to disappear merely because an entity or authority goes out of existence and is not succeeded by another entity which explicitly assumes its rights and obligations. Modern civilized systems are too sensitive to justice to permit so illogical and inequitable a result." (*Observations*, p. 447 **(I)**.)

Mr. President, I know of no justification for any such generalization. Again the question must be one of effective intent in each particular case; the intent of the legislature, the intent of contracting parties, the intent of a testator, or whatever the situation may be with which we are confronted. If in the light of such intent we find that the dissolution of an entity or authority leaves an existing right or obligation unaffected, then *caedit questio*. But if we find in the light of such intent that the right or obligation is rendered incapable of continued existence by the dissolution of the entity or authority, then that right or obligation must

necessarily disappear on such dissolution unless there is specific provision for the contrary. And there can, in my submission, be nothing illogical or inequitable involved in thus giving effect to the intent which creates and which controls legal rights and obligations.

Finally, Mr. President, we find that the Applicants state, at the bottom of page 447 (I), that:

> "With respect to the Mandate, the legal relations established by the League continue to exist. In addition to the reasons already set forth to support this conclusion, there is an act of the League of Nations which in effect constitutes a 'saving clause' of the kind referred to above. This act of the League is the adoption of its Resolution of April 18, 1946, and particularly paragraphs 3 and 4 thereof..." (*Observations*, pp. 447-448.)

And then those paragraphs 3 and 4 are set out. Now how this could be said to be a "saving clause" relative to competence to invoke Article 7 I do not know, Mr. President. It does not mention that subject. It recognizes that on termination of the League's existence its functions with respect to Mandated territories would come to an end. It refers to possible future arrangements that may be agreed between the United Nations and the respective Mandatory Powers. But it makes no reference whatsoever to any continued relationship in regard to Mandates between a Mandatory and other Members of the League, let alone any reference to a continued possible competence to invoke Article 7.

If there were to be found an effective saving clause, as contended for by the Applicants, it would have had to provide to the effect that, notwithstanding dissolution of the League, and notwithstanding loss of all League memberships, States that were Members of the League at the date of dissolution would nevertheless continue to retain the competence to invoke Article 7. And there is nothing which is contained in this resolution which could, even remotely, suggest that there was any such contemplation involved in it.

I submit, therefore, Mr. President, that there is no substance whatsoever in any of these so-called "carry-over" arguments of the Applicants, and that, as far as their merit is concerned, they are to be rejected. I wish to refer to only two further aspects of the "carry-over" argument.

One of them is that although the Applicants refer to the dissenting Opinions of Judges McNair and Read in 1950, to the fact that they found a basis for saying that Members—States that were Members of the League at the time of the dissolution—could still have the competence to invoke Article 7—although that is referred to, and ostensibly supported by the Applicants as their second string, their "carry-over argument", in actual fact, on analysis is totally different from the line of reasoning employed by Judges McNair and Read. It does not support that line of reasoning of a "descriptive" meaning and, in fact, jettisons that line of reasoning. It assumes that there would be a loss of competence to invoke Article 7 but for a special arrangement, a special contemplation of this carry-over.

Secondly, Mr. President, the Applicants state that they rest their contentions as to Article 7 on "either or both bases". At page 443 of the Observations they say:

> "Applicants, nevertheless, rest their submission on jurisdiction on either or both bases."

I submit that they cannot rest them on both bases, Mr. President,

because the bases are mutually inconsistent, and if they are both to be advanced they would have to be advanced as alternatives. If there should be a succession, as contended for by the Applicants, which took this competence now from Members of the League to Members of the United Nations, then there would be no occasion, no necessity, no scope whatsoever, for inferring any intent as to a carry-over. The two things are, as conceptions, mutually inconsistent with one another. "Carry-over" would surely only be provided for in respect of an activity which would otherwise come to an end, and if there is provision, tacitly or otherwise, for a succession as contended for by the Applicants, then there would be no occasion for a "carry-over".

Finally, Mr. President, if the majority Opinion regarding Article 7 in 1950 is to be regarded as resting upon a succession regarding Article 6, by reason of a tacit understanding or agreement arrived at during the transition period, then that finding in the majority Opinion would be totally inconsistent with this suggestion of the Applicants as to "carry-over", and to that extent then the Applicants contention would be in conflict also—in direct conflict—with the majority Opinion on this point.

This is quite apart from the variance to which I have referred before, *namely that in regard to its actual finding in regard to Article 6 the ma*-jority Opinion appeared to rest that finding on a tacit understanding which it inferred from the events during the transition period, whereas the Applicants do not attempt to support that; they attempt to found the succession for which they contend on something to be read into Article 6 of the Mandate Agreement as originally agreed upon.

Mr. President, I will conclude in a few minutes. I merely wish to refer to page 438 (I) of the Observations relative to these last remarks which I made. There the Applicants state in the second paragraph:

> "It follows from either the majority or minority analysis that Applicants are competent to invoke Article 7, and that Respondent's *contention is inconsistent with the view of every member of the* Court."

The analysis that I have put forward to the Court, with submission, shows that the boot is somewhat on the other foot: that this "carry-over" contention advanced by the Applicants is not supported either by the majority or the minority view in 1950, and that the succession advanced by the Applicants is something different from the succession found in the majority Opinion in 1950. This is particularly significant because of the fact that the new information and facts not before the Court in 1950, and now presented by us, deal particularly with the transition period, and indicates that there could be no basis for finding tacit assent there, as the Court apparently did in 1950.

Mr. President, the conclusion to which the portion of the argument with which I have just dealt leads, is that stated by way of alternatives in our second and third contentions, namely, that by reason of there no longer being any Members of the League, Article 7 has ceased to be in force as a treaty or convention, or alternatively, if it is still so in force, then there are no States competent to invoke it. That by itself, stated in these two alternatives, is an objection to jurisdiction and we submit it is sound. That, taken in conjunction with our argument regarding Article 6, and our argument regarding Articles 2 to 5, leads to

the other conclusion, which we submit is also sound and which is our first contention, namely, that the Mandate as a whole has ceased to be a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. Naturally, success on one or the other of these would be sufficient for our purposes.

I wish to express my appreciation to you, Mr. President, and to all the Members of the Court, for the patience and the courtesy accorded to me during the argument.

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3. ARGUMENT OF Mr. MULLER

(COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA)
AT THE PUBLIC HEARINGS OF 10 AND 11 OCTOBER 1962

[Public hearing of 10 October 1962, morning]

Mr. President and Honourable Members of the Court.

Before proceeding with my argument I would like to associate myself with the remarks of my learned friends, Dr. verLoren van Themaat and Mr. de Villiers, in paying respect to this Court. It is indeed an honour for me to appear before this Court. I intend now, if it pleases the Court, to present our argument on the Third Objection.

For the purposes of this Objection it is assumed that, despite the dissolution of the League of Nations, Applicants would still be entitled to invoke the provisions of Article 7 of the Mandate for South West Africa in an appropriate case—that is, in a case where there exists between the Applicants and Respondent a "dispute" as envisaged in Article 7.

This Objection raises the question whether the conflict or disagreement alleged to exist between Applicants and Respondent constitutes a dispute as envisaged in the Article.

The Applicants contend that there is such a dispute. Their contention in this respect is set forth at page 91 (I) of the Memorials, where they say that they for their part allege, and Respondent for its part denies, that Respondent has violated and is violating Articles 2, 4, 6 and 7 of the Mandate.

We, on the other hand, Mr. President, contend that the alleged conflict or disagreement is not a "dispute" envisaged for adjudication by the Court in terms of Article 7 of the Mandate—more particularly, in that the said conflict or disagreement does not affect any material interests of the Applicant States or their nationals. That, then, is the crisp issue between the Applicants and Respondent.

In stating our case, however, with regard to this Objection, it is necessary at the outset to deal with certain general remarks made by the Applicants at page 450 (I) of their Observations. In the first place they say that the Third Objection is devoted to "an attempt to insert into Article 7 a requirement which does not exist". Now, Mr. President, this comment on the part of the Applicants is, we submit, without substance. We rely for our contention not on an insertion in Article 7 of words not appearing in the text, but on a proper construction of the word "dispute" in the context in which it does appear. It is therefore not a case of reading something into the text, but of reading properly what in fact already appears in the text.

In a broad sense the word "dispute" may embrace a difference of opinion, disagreement or conflict of views between persons or States. It may in that very broad sense include disagreements or conflicts concerning matters in which the disputants themselves have no legal interests or rights. In a compulsory jurisdiction clause, however, such

as Article 7, there is a qualification inherent in the meaning of the word "dispute", and that qualification is a confinement of the subject-matter in dispute to something in which the disputants themselves have legal rights or interests. We submit that this limitation flows as a legal conception and as a matter of logic from the intended functions of courts of law. In international law, as in municipal law, courts exist for the adjudication and settlement of claims arising from legal rights or legal interests; the courts are not there for judicial expression on differences of opinion or on conflicts of views unrelated to the legal rights or legal interests of the litigants.

It follows in our submission, Mr. President, that in the absence of any contrary direction or indication in Article 7 of the Mandate, the word "dispute" must be given its generally accepted meaning in the context of a compulsory jurisdiction clause, and that is a disagreement or conflict between the Mandatory and another Member of the League concerning the legal rights or interests of such other Member in the matters before the Court. Such matters must of course, in compliance with Article 7, relate to an interpretation or application of the provisions of the Mandate.

Mr. President, we are mindful of the fact that in Article 7 the word "dispute" is flanked by the words "any" and "whatever", the expression being "any dispute whatever". It could, however, not have been intended by the use of these two words "any" and "whatever" to render justiciable at the instance of a Member of the League a disagreement or difference of opinion with the Mandatory regarding a matter in which such Member was not meant to have a legal right or a legal interest.

We submit that the Judgment in the *Mavrommatis* case furnishes clear support for that proposition—that is, that in order to invoke the compulsory jurisdiction clause in any mandate, an applicant must have a legal right or an interest in the matter intended for adjudication by the Court. The majority of the Court in the *Mavrommatis* case defined a dispute at page 11 of the reported Judgment as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". But, Mr. President, the majority was careful in demonstrating that the applicant in that particular case had a legal interest in the matter in dispute. A legal interest on the part of the Government of the Greek Republic was involved, so the majority held, on the basis of a principle in international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State, with the result, then, that in taking up the case of its subject the applicant State was "in reality asserting its own rights". (P.C.I.J., Series A, No. 2, 30 August 1924, p. 23.)

It is also clear, as we indicated at pages 377-379 (I) of the Preliminary Objections, that also in the five dissenting opinions in that case a legal right or interest was regarded as necessary for *locus standi* on the part of the applicant. We have set out, at pages 377-379 of the written Objections, quotations from the opinions of the dissenting judgments in the *Mavrommatis* case, and there is no need for me to read them again. But it is clear that the views of all the Judges in that case with regard to this aspect of jurisdiction rest on a sound legal basis, and that can easily be demonstrated. Let us assume, for instance, that instead of the Greek Government, some other Member of the League

of Nations at the time had attempted to espouse the cause of Mr. Mavrommatis. Would the Court have had jurisdiction in such a case? Surely the answer must be an emphatic "No"! And why would the Court not have had jurisdiction when such other Member of the League fitted the description of States entitled to invoke the compulsory jurisdiction clause, and when the matter in conflict was one concerning the interpretation or application of the provisions of the Mandate? The reason, of course, is that in the hypothetical case that I have postulated the applicant State would have had no legal interest in the disagreement or conflict between the Mandatory and Mr. Mavrommatis, who was not its subject. In such a case there would not have been a dispute as envisaged in the compulsory jurisdiction clause, and therefore no *locus standi* on the part of the applicant State.

If the word "dispute" in Article 7 embraced all disagreements or conflicts, irrespective of any legal right or interest on the part of the State seeking to invoke the Article, then surely there would have been no cause for the Court in the *Mavrommatis* case to have enquired, as it in fact did, into the legal rights of the applicant State.

At page 457 **(I)** of their Observations, the Applicants refer to our contention that no dispute is envisaged by Article 7 unless the subject-matter affects a material interest of the Applicant State or its national. Then they go on to say that, in support of its contention, Respondent cites, *inter alia*, the *Mavrommatis* case; and they submit later, at the same page, that the opinions in the *Mavrommatis* case do not in fact support Respondent's view. At pages 446-467 **(I)** of their Observations the Applicants deal with the *Mavrommatis* case, but nowhere do they state a denial of our contention that that case is clear authority for the proposition that a State, in order to invoke the compulsory jurisdiction clause, must have a legal right or interest in the matter submitted for adjudication to the Court.

At page 450 **(I)** of their Observations, the Applicants quote the definition of a "dispute" from the Majority view in the *Mavrommatis* case, that is, as defined by the Majority, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". The Applicants then say that "this definition ... is in complete accord with a number of subsequent definitions of the term 'dispute' rendered by the Permanent Court as well as by this Court", and they state that "the only disagreement [in the cases to which they refer] appears to have centred upon the question of when a disagreement or conflict must have been manifested". (*Observations*, pp. 450-451 **(I)**.)

That statement is correct as far as it goes. But in none of the cases referred to by the Applicants, nor in any other case that we are aware of, has there ever been an attempt to bring to Court as a dispute in contentious proceedings a matter in which the Applicant State had no legal interest or right, either directly or through its subjects.

In fact, Mr. President, the Applicants themselves seek to found their case as to *locus standi* on the contention that they (as former Members of the League of Nations or as Members of the United Nations) have a legal interest in the matters presently before this Court; they say, at pages 91-92 **(I)** of their Memorials, as follows:

> "The Applicant has a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated."

This contention is repeated at page 463 (I) of the Observations, where we find the following:

> "... it was indeed the intention of the founders of the Mandates System to grant to each Member of the League a 'legal interest' in the observance by the Mandatory of its obligations for the benefit of the inhabitants of the Mandated territories".

Now, this contention of the Applicants, that is, that they have a legal interest in seeing to it, through judicial process, that the sacred trust of civilization is not violated, can be sound only if, upon a proper construction of Article 22 of the Covenant and the Mandate instrument, certain conclusions follow. And the first conclusion must be that the Members of the League were intended to have individually a legal interest in the observance by the Mandatory of the conditions imposed in the Mandate for the benefit of the inhabitants of the territory, even in cases where the breach of these obligations by the Mandatory did not affect the material interests of individual League Members, either directly or through their nationals. And the second conclusion that must follow is that, in view of such a legal interest, if it is held to exist, each Member of the League, if it considered that the Mandatory was not observing its obligations towards the inhabitants, was entitled not only to raise the matter in the League for its consideration and attention, but also to take it up directly with the Mandatory and, failing satisfaction, to institute contentious proceedings against the Mandatory with regard thereto.

The answer to both the above questions must depend on the intention of the parties. Of course, the intention of the parties must, primarily, at least, be ascertained from an interpretation of Article 22 of the Covenant and the Mandate instrument.

With regard to the first of the propositions that I have stated as conclusions which must follow from the Applicants' contention, a consideration whether individual League Members were intended to have a legal interest in the observance by the Mandatory of its duties towards the inhabitants is necessary, not because there must be read into Article 7 a requirement which is not included in the text, but because the word "dispute" in the very context of a compulsory jurisdiction clause bears, as I have indicated, an inherent qualification, that qualification being a disagreement or conflict relating to a matter in which the Applicant who moves the Court has a legal right or legal interest.

If, after due consideration, it is found that individual League Members were not intended to have such a legal interest, then it follows that the Applicants have no legal interest in the matters which are presently before the Court, and consequently there would then be no dispute as envisaged in Article 7, for adjudication by the Court. That in itself would put an end to the matter in that this particular Objection must then succeed, with respect; and that is so without reading into Article 7 a requirement which is not included in the text thereof.

If, however, it were to be found that League Members were intended to have a legal interest in the observance by the Mandatory of its obligations towards the inhabitants, then, and then only, does it become necessary to consider the second of the propositions which I have stated, that is, whether that legal interest was intended to be exercised by the League Members collectively, that is, by raising of matters for discussion

in the League itself, or whether it was intended for individual League Members to be taken up in the form of disputes with the Mandatory to which the provisions of Article 7 could apply.

The second general remark made by the Applicants concerning our contention that no dispute can exist unless the subject-matter of the dispute affects the material interests of the Applicants States or their nationals, is to be found at page 450 (I) of the Observations. There the Applicants say:

> "Applicants submit that Respondent's contention is not only erroneous in substance, but also misconceived in logic. If relevant at all, Respondent's contention relates not to whether a 'dispute' exists, but to whether or not the dispute relates to the 'interpretation or the application' of the Mandate. Applicants accordingly will discuss the contention under that heading in this Chapter."

Now, Mr. President, this submission of the Applicants, we submit, attracts to itself the very label which they seek to fix to Respondent's contention, namely a misconception in logic. Our contention is not concerned with the question whether the subject-matter of the dispute falls within the category interpretation or application of the Mandate. We assume, for the purposes of our argument, that it does so fall. Our contention is concerned with the question whether the Applicants have a legal interest in the matters complained of by them and if so whether that interest was intended to be enforceable by judicial process in terms of Article 7 of the Mandate.

Both these questions, as I have already indicated, turn upon the meaning of the word "dispute" in the compulsory jurisdiction clause. To illustrate the correctness of this view we can again have regard to the *Mavrommatis* case.

Let us assume that instead of the Government of the Greek Republic another League Member at the time had attempted to espouse the cause of the Greek citizen Mavrommatis. The Court surely would have had no jurisdiction—not because the subject-matter of the claim would have been any different from what it in fact was, that is one concerning the interpretation and application of the Mandate, but because of the absence of any legal right on the part of the Applicant and therefore the absence of a dispute as envisaged in the compulsory jurisdiction clause.

We will therefore deal with the matter under what we conceive and contend to be the correct rubric, namely whether there is a dispute, and not under the heading chosen by the Applicants, namely whether the dispute concerns the interpretation or application of the Mandate.

Having clarified the issues, I will now deal first with our contention that it was not intended that League Members should individually have legal rights or interests in the observance by the Mandatory of the conditions imposed in the Mandate for the benefit of the inhabitants of Mandated territories, so far as the non-observance thereof would not affect the material interests of individual League Members either directly or through their nationals.

This contention raises, in the first place, the question whether the League of Nations was a legal *persona* or not.

At page 308 (I) of our written Objections, we cited weighty authority for the view that the League of Nations was a corporate body endowed with legal personality.

Nowhere in their Observations do the Applicants contest the proposition that the League was a legal *persona*. On the contrary, at page 448 (I) of their Observations, the Applicants state as follows:

> "Respondent's argument misses the central point. If the League still existed as such, and a State withdrew from membership, there would still remain *a corporate body* and a membership thereof which could assure compliance with the Mandate."

A recognition then on the part of the Applicants that the League was a corporate body. And, in fact, they propound an argument at page 446 (I) of their Observations which seeks to apply to the League the operation of a so-called carry-over principle, a principle which, according to the Applicants, is, by virtue of certain statutory provisions in the laws of various States, applicable to corporations.

We have already dealt with the carry-over, or so-called carry-over principle, but I merely refer to it at this stage of my argument as proof of the Applicants' acceptance of the proposition that the League was a legal *persona*.

Now, with the League as a legal *persona*, it is only natural and logical, we say, that the obligations imposed for the benefit of the inhabitants would have been owed to the League on whose behalf the Mandatory undertook to exercise the Mandate. League Members would then, by virtue of their membership, be entitled to participate in the League's supervision of the Mandate, but would individually, *vis-à-vis* the Mandatory, have no legal right or interest in the observance by the Mandatory of its duties to the inhabitants.

It may be argued that in contracting with the Mandatory the League obtained rights not only for itself but also for the individual Members, either by way of a contract of agency or a contract for the benefit of Members as third parties.

That the League in so contracting obtained for its individual Members a legal interest in the provisions of the Mandate in so far as the non-observance thereof could affect the material interests of the Members or their nationals is not disputed by us.

With regard to the provisions of the Mandate which were intended solely for the benefit of the inhabitants, the non-observance whereof could not affect the material interests of individual League Members or of their nationals, the position, we submit, is, however, entirely different.

The provisions of Article 22 of the Covenant and those of the Mandate itself appear to exclude the possibility that League Members were intended to have a legal interest in matters not affecting their material interests, that is in matters which could affect only the inhabitants.

Thus, in paragraph 2 of Article 22 of the Covenant, there is a provision in explicit terms that the Mandate should be exercised "on behalf of the League". It did not provide that it should be exercised on behalf of the League *and* its Members. This provision was repeated in the preamble to the Mandate instrument.

Then Article 7 of the Mandate made provision for modification of the terms of the Mandate with the consent of the Council of the League. Article 7 reads as follows:

> "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate..."

There was no provision which required that the consent of individual League Members be obtained, nor even that individual League Members be consulted with regard to any proposed change of the terms of the Mandate.

Another point is that paragraph 1 of Article 22 of the Covenant provides that the securities for the performance of the sacred trust of civilization were embodied in the Covenant itself. And the only securities *mentioned in the Covenant were those prescribed in paragraphs* 7 and 9 of Article 22. These paragraphs read as follows:

> "7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge...
>
> 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 Covenant did not provide, or contemplate, any accounting by a Mandatory for its administration of the Mandate to individual League Members, the only provisions, as I have indicated, being paragraphs 7 and 9 providing for accounting to the League itself. Moreover, the Mandatory's annual report had to be to the satisfaction of the Council. Individual League Members had no say with regard to the nature and scope of the contents of such a report.

When, therefore, the Covenant of the League, in Article 22, provided in explicit terms that the Mandate would be exercised on behalf of the League and not on behalf of the League and its Members; when Article 22 was intended to embody the securities for the performance of the sacred trust and provided for accountability to the League only and not also to its Members, and when in addition the Council, in framing the Mandate instruments, retained for *itself* the right to consent, without *reference to individual League Members, to any modification of the terms* of the Mandate, surely then it would be strange if in the Mandate instruments it was intended to confer on individual League Members a legal interest in the observance by the Mandatory of its obligations, in so far as such obligations affected only the inhabitants of Mandated territories. Surely if that were the intention, it would have been stated in explicit terms.

Mr. President, having tested the Applicants' contention against the provisions of the Covenant and the Mandate instrument, let us have regard to the probabilities of the matter, because our submission will be that Applicant's contention also runs counter to the probabilities.

Supervisory functions with regard to Mandates were, in express terms, reserved not for the Assembly of the League but for the Council—a particular organ of the League with limited membership—acting with the assistance of another particular body, the Permanent Mandates Commission. We say that it could hardly have been the intention that in addition to the supervisory functions of the Council each and every Member of the League would, by virtue of an individual legal interest, stand in the position of a custodian of the rights of the inhabitants of Mandated territories.

One cannot conceive of the Council intending, and the respective Mandatories agreeing, that despite the express reservation of supervisory functions to the Council, individual League Members would be entitled

to assert legal rights with regard to the Mandatories' legislative acts and administrative measures concerning the inhabitants of Mandated territories. This could bring about interference by individual League Members in all aspects of Government policy and political situations involving the peoples of Mandated territories.

Surely the position of a Mandatory would, to say the least, have been extremely invidious under such circumstances. In accounting for its administration to the Council of the League it may have satisfied that body on all matters affecting the inhabitants, but still an individual League Member, disagreeing with the Mandatory and with the unanimous views of the Members of the Council, and perhaps even with all other Members of the League, could, by virtue of its legal rights, seek to impose on the Mandatory its own particular views as to the proper administration of the Mandate. And the Council's position in such circumstances would have been equally invidious: the very conferment, we submit, on individual League Members of powers equal to, and concurrent with, those of the Council relative to Mandate administration would have tended to undermine the Council's authority in that field.

One needs but look at the functions entrusted to the various organs of the League to realize that a right such as claimed by the Applicants for themselves as individual League Members could never have been intended.

A League of Nations publication—*The Mandate System—Origin—Principles—Application*—makes it clear that the right to take decisions in regard to Mandate questions belonged solely to the Council of the League. We cite from this publication at page 385 (I) of the written Objections:

> "Thus the role of the Assembly consists in the exercise of a certain moral and very general influence in this domain. [That is relative to mandate administration.] Its function may be said to be to maintain touch between public opinion and the Council.
>
> *The right to take decisions in regard to mandate questions belongs, however, to the Council.* It exercises its supervision with the aid of the Permanent Mandates Commission, instituted by the Covenant itself.
>
> The Covenant provides that this *Commission* is 'to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates'. It is therefore essentially an advisory body—a body whose duty it is to examine and report—designed to assist the Council in carrying out its task. Its work is preliminary in character. Constitutionally, *it has no power to take decisions binding on the mandatory Powers or to address direct recommendations to them.* Its conclusions are not final until they have been approved by the Council."

It is clear, then, as we read from that publication, that the Permanent Mandates Commission—a body of experts—provided for in the Covenant as an important cog in the system of Mandate supervision, was not even entitled to address a recommendation to a Mandatory; and even the Assembly composed of all the Member States could take no decisions in regard to Mandate questions. Surely, then, it could not have been intended that an individual League Member would have the right to decide for itself what measures should be adopted by a Mandatory, or

should not be adopted, and then to assert a right against the Mandatory in that regard.

The Applicants' contention must result in at least the acceptance of the possibility that an individual League Member could assert rights against a Mandatory with regard to matters of policy in Mandate administration.

But even more, it must result also in the acceptance of a possibility that in the exercise of its individual rights a League Member could, on its own, seek to dictate to a Mandatory the adoption of a particular policy, and that so, despite the fact that such a policy may have been considered unwise by the Mandates Commission, outvoted by the General Assembly and even rejected by the Council of the League.

Furthermore, the Mandatory could stand in the midst of conflicting demands upon it by different Members who do not see eye to eye with the Mandatory and with each other as to policies to be applied in Mandate administration. One Member could favour a particular policy, another Member an entirely different policy.

Surely the question whether such a situation could ever have been intended need but be asked to answer itself.

We therefore contend that individual Members of the League were not intended to have a legal right or interest in the observance by the Mandatory of conditions imposed in the Mandate for the benefit of the inhabitants of the Mandated territory, the non-observance of which could not affect the material interests of the individual League Members, either directly or through their nationals.

That League Members were meant to have certain legal rights in the administration of Mandated territories is clear. Each of the Mandate instruments contained provisions apparently intended also for the benefit of Member States and their nationals. We have, for example, the open door provisions appearing in all the A and the B Mandates and we have provisions in the C Mandates relative to the rights of freedom of movement of missionaries who are nationals of League Members. Then there were also contained in the Mandate instruments other provisions, primarily intended for the benefit of the inhabitants, but the non-observance of which could, however, affect also the material interests of individual League Members. To mention, as examples, the provisions with regard to the slave trade, provisions with regard to traffic in liquor if these provisions were violated by a Mandatory it could perhaps affect a neighbouring State which, being a Member of the League, would then have a right to object and would have a legal right to assert in that respect. But in our submission it follows, not only from a proper construction of Article 22 of the Covenant and the Mandate instrument, but also from a consideration of all the probabilities that League Members were not intended to have a legal interest of the kind contended for by the Applicants, namely a legal interest to see to it that a Mandatory observed its obligations to the inhabitants, and that so even where a League Member was unable to point at any matter affecting its own nationals or itself.

We say that, inasmuch as the Applicants do not, and in truth cannot, contend that they or their nationals are affected by the matters in conflict in these cases, their legal interests are not involved and there is accordingly no dispute as envisaged in Article 7 of the Mandate for adjudication by the Court.

But, Mr. President, if, contrary to what I have just submitted, it should be held that individual League Members were intended to have a legal interest in the observance by a Mandatory of all its obligations, including also the obligations intended solely for the benefit of the inhabitants, the non-observance whereof could not affect Member States either directly or through their nationals, then the further question arises, and that is, whether such interest, in so far as it concerned the well-being of the inhabitants, was intended to be exercised only by participation in League proceedings regarding Mandates, or also by direct action against a Mandatory and invocation of Article 7.

Individual League Members could have had such a broad interest as I have indicated, only if it should be held, contrary to the weighty authority relied on by us, and apparently accepted by the Applicants, that the League was *not* a legal *persona* and that all the Mandatory obligations were consequently intended to be owed to the individual League Members; or, if the League should be regarded as a legal *persona*, that, despite the provisions of Article 22 of the Covenant and the Mandate instrument, and despite the anomalies and implications which I have mentioned, it was intended that a legal interest in the observance of all the provisions of the Mandate should vest not only in the League as a corporate body but also in the individual League Members.

Again, in that respect, the enquiry centres around the provisions of the Covenant and the Mandate instrument and around the probabilities of the case.

Looking first at the Covenant and the Mandate instrument, we find that according to paragraph 1 of Article 22 of the Covenant securities for the performance of the sacred trust of civilization were embodied in the Covenant itself. With regard to supervision of the Mandatories in the exercise of their Mandates, the Covenant made provision only for supervision by the Council of the League.

There was no mention in Article 22 of the Covenant, or in any other part of the Covenant, of a form of judicial supervision, or, for that matter, any form of supervision other than that to be exercised by the League itself.

We say, then, that it is unlikely that, in the absence of any provision to that effect in the Covenant, Article 7 of the Mandate was intended to establish a form of judicial supervision. If it were so intended, one would surely have expected it to be expressed in very clear terms.

Moreover, where provision was made for supervision by the League itself, what need was there for an additional and independent supervisory body? The League was empowered to deal with all matters pertaining to Mandate administration. Individual Members could raise for discussion in the organs of the League any matters pertaining to Mandate administration and, in that manner, they could assert whatever legal rights they had in the observance by the Mandatory of its obligations in so far as the inhabitants were concerned. In any matter which involved a legal question concerning the interpretation or application of the provisions of the Mandate, the League could have had resort to the Court for an advisory opinion.

We say that it is unlikely that the Council of the League could have considered that there would be need for judicial supervision of the nature contended for by the Applicants. In our submission such a view on the part of the Council would have been tantamount to an acknowledgment

in advance of a possible failure of its supervision; and, surely, the Council must have foreseen the danger of conflict or interference with its own supervision.

In this respect attention is again drawn to the anomalous situations which could arise if, in addition to the League's supervision, individual Member States were entitled to interfere with the exercise by a Mandatory of its legislative and administrative powers.

The position becomes all the more anomalous if such interference was armed with the right of subjecting the Mandatory to legal proceedings.

A Member of the League, being dissatisfied with the Mandatory's administration, and not being content with the Council's approval thereof, could demand a change under threat of legal proceedings. The position could arise where different States make different and even conflicting demands on the Mandatory which, if not resolved by negotiation, could be submitted to the Court.

Now, how could a Mandatory whose administration carried the approval of the League negotiate for a change which could conflict with the views of the Council? Concessions made to one Member could still be rejected by another, or the others; and the Mandatory's willingness to effect changes and to negotiate a settlement would have been of no avail, resulting in its having to defend judicial proceedings at the instance of one or other, or perhaps even both such States.

The very idea of such negotiation sounds unreal—not only in the complicated circumstances that I have just mentioned, but in any case involving matters of policy, as applied in legislative measures and administrative acts.

Furthermore, as we have indicated at pages 386-388 **(I)** of our written Objections, the Court could then be called upon to function as an umpire in matters of a purely political nature, namely, to pronounce upon the soundness of a Mandatory's legislative acts and administrative measures involving the material and moral well-being and the social progress of the inhabitants of a Mandated territory.

In our submission, such a role could not have been intended for the Court; we say it is a role outside the normal functions of Courts of law.

The compulsory jurisdiction clause was meant, we submit, for the protection of Member States, that is, to obtain judicial pronouncement on matters which affect their material interests, either directly or through their nationals. I have already mentioned examples of the material interests of States that could be affected.

In our submission, the Applicants' contention that the purpose of the clause was to establish a judicial supervisory organ in the Mandates system, is not only in conflict with the provisions of Article 22 of the Covenant, but, as I have indicated, is also against all the probabilities.

To invoke the clause, as the Applicants attempt to do, with the intention, as they say, of benefiting only the inhabitants of South West Africa, and without being able to point at any matter affecting the material interests of the Applicants themselves, or of their subjects, is, in our submission, an attempted application of the provisions of the clause towards a purpose for which they were not intended.

In the premises, Mr. President, we submit that the Applicants have no *locus standi* in the present proceedings and it follows then, in our submission, that the Court accordingly has no jurisdiction.

Mr. President, I deal next with the Applicants' reply to the contentions raised by us in regard to this Objection. They deal with it at pages 456 **(I)** to 473 of the Observations, under the heading: "The Dispute Relates to the Interpretation and the Application of the Provisions of the Mandate." Now, as I have already stated, this is an inappropriate rubric for consideration of this Objection.

The Applicants start off by quoting from the majority view in the *Mavrommatis* case, that a dispute covered by the compulsory jurisdiction clause in the Mandate instruments

> "may be of any nature; the language of the article in this respect is as comprehensive as possible *(any dispute whatever...)*; but in every case it must relate to the interpretation or the application of the provisions of the Mandate". (*Observations*, p. 456 **(I)**.)

The Applicants then proceed to restate the matters with regard whereto there exists a conflict or disagreement between them and Respondent, in order to demonstrate that these matters concern the interpretation and the application of the provisions of the Mandate.

Now, for the purposes of this Objection we have, of course, assumed that the matters now before the Court are covered by the provisions of Article 7 of the Mandate, in so far as that Article requires that matters for adjudication must relate to the interpretation or the application of the provisions of the Mandate.

Our contention, as advanced in the written Objections, and as I have already dealt with in argument, is that the conflict or disagreement between the parties does not constitute a "dispute" as envisaged in Article 7 of the Mandate.

Our case in this respect is very tersely put by the Applicants at page 457 **(I)** of their Observations, where they say as follows:

> "Respondent, however, contends that no 'dispute' is envisaged by Article 7 unless the subject-matter affects a material interest of an Applicant State or of its national."

Now, correct as this statement may be, it does not bring out the grounds underlying our contention. These grounds are: firstly, that the word "dispute" in a jurisdiction clause such as Article 7 connotes a conflict or disagreement concerning matters in which the Applicant has a legal right or interest. The second is that the Applicants as individual League Members were not intended to have a legal right or interest in matters such as those now before the Court unless their material interests were affected either directly or through their nationals; and inasmuch as their material interests are not affected, their legal rights or interests are not involved, and therefore it cannot be said that there is a dispute in terms of Article 7. Finally, that even if it can be said that the Applicants have a legal right or legal interest in the matters presently before the Court, we say it was not intended that such right or interest could, in the absence of anything affecting the material interests of the Applicants or their nationals, give rise to a dispute envisaged in Article 7 for the adjudication by the Court.

In proceeding, the Applicants state that Respondent cites in support of its position the "*Mavrommatis* case, the case of *Jerusalem-Jaffa District Governor and another* v. *Suleiman Murra and others*, and the views of four writers, Feinberg, Judge McNair, Wessels and Schwarzenberger".

(*Observations*, p. 457 **(I)**.) That this statement is not entirely correct will be shown later when I deal specifically with these authorities.

A further statement by the Applicants is that "Respondent also asserts general principles, including its view that the framers of the Mandates system did not intend that a dispute of the sort involved here [*i.e.* the proceedings presently before the Court] would be covered by Article 7". (*Observations*, p. 457 **(I)**.)

Now, this statement is correct as far as it goes, but it conveniently omits any reference to the fact that for our contention we rely to a very great extent on the provisions of Article 22 of the Covenant and on the provisions of the Mandate instrument.

The Applicants follow up, in their Observations at pages 457-458, with certain submissions. Those submissions are: that "the opinions in the *Mavrommatis* case and the *Jerusalem* case do not ... support Respondent's view"; secondly, that "two of the scholarly authorities cited by Respondent do not support Respondent's contention, and a large number of other scholars, expert in the Mandates system, support Applicants' view"; thirdly, that "the framers of the Mandates system intended that the type of dispute involved in the instant cases should be covered by Article 7 of the Mandate"; and in the fourth place, that "even if Article 7 were interpreted as requiring a so-called 'material interest', such an interest is present" in the cases now before the Court.

I will deal with each of these four submissions in the same order in which they are dealt with by the Applicants in their Observations.

In regard to the first part of the Applicants' argument, there appears under the heading: "The Purpose and History of the Compromissory Clause in the Mandates System", the following passage, at page 458 **(I)**:

> "The announced intention of the founders of the Mandates System, the circumstances surrounding the creation of the System, and the nature of the structure they created, demonstrate that the Permanent Court of International Justice was designed to be an integral part of the supervisory machinery of the system. It was intended to adjudicate, at the instance of any Member of the League, disputes affecting the interpretation and application of the Mandate with respect to the well-being of the inhabitants of the Mandated territories."

That is a statement in general of the Applicants' contention. Now, on what is that contention founded?

First, the Applicants at that very page point to a so-called "overriding concern demonstrated by the founders of the Mandates system for the well-being and development of the inhabitants" of Mandated territories. They refer in this respect to President Wilson's expressed view that the "purpose [of the system] was to serve the people in undeveloped parts, and to safeguard them against abuses"; the Applicants say that "the concept of the 'sacred trust', the explicit norms and standards imposed on the Mandatory, and the unprecedented machinery of international supervision, *all had their animating principle in the desire of* advanced nations to protect and assist peoples not yet able to stand for themselves". (*Observations*, p. 458 **(I)**.) They go on to quote this Court in its Advisory Opinion of 1950 to the effect that "the Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international

object—a sacred trust of civilization". (*1950 Opinion*, p. 132.) They then draw the conclusion that "inasmuch as the well-being of the inhabitants of Mandated territories constitutes the essential purpose of the Mandates system, it is impossible to accept Respondent's contention that the Court may not entertain disputes which are primarily concerned with the well-being of such inhabitants" (*Observations*, p. 458 **(I)**) their contention then being that it is impossible to accept Respondent's contention that the well-being of the inhabitants may not be protected by contentious proceedings.

But supposing, for the purposes of argument, that the Applicants are correct in saying that the well-being of the inhabitants constituted the essential purpose, or an essential purpose, of the Mandates system, how does the conclusion follow that such well-being was intended to be protected by judicial proceedings at the instance of individual Members of the League?

Surely the question as to whether there was meant to be a form of judicial supervision depends upon the intention of the authors of the Mandates system, that is, the authors of the Covenant; and their intentions must, primarily at least, be gathered from an interpretation of the provisions of the Covenant.

Let us then look at the provisions of the Covenant to see what was the intention of the authors of the Mandates system. Article 22 of the Covenant provided that the tutelage of the inhabitants should be exercised on behalf of the League, and there is no provision, as I have indicated, for it to be exercised on behalf of individual League Members, as one would have expected if the intention were to confer on individual League Members rights enforcible by judicial process with regard to the well-being of the inhabitants.

Article 22 recorded that the securities for the performance of the sacred trust, that is the securities for the protection and promotion of the well-being of inhabitants of Mandated territories, were embodied in the Covenant, and as I have indicated, Article 22 prescribed securities only in the form of certain supervisory machinery to be found in the Council of the League and in the Permanent Mandates Commission. No other form of supervision was either mentioned or contemplated in Article 22, or, for that matter, in any other part of the Covenant.

The Council of the League was empowered, in terms of paragraph 8 of Article 22, to define in each case the degree of authority, control or administration to be exercised by the Mandatory. The Council was not authorized to create additional supervisory machinery not provided for in the Covenant.

In the light of these explicit provisions of Article 22, how can it then be said that Article 7 of the Mandate was intended to create an additional security or safeguard in the form of judicial supervision? The Applicants, however, with remarkable facility, we submit, disregard entirely the express provisions of Article 22 of the Covenant and, moreover, they avoid the argument propounded by us with reference thereto. Nowhere in their Observations do they take us up on our contentions that, by reference to the Covenant and the provisions of the Mandate, it is clear that the intentions of the authors of the system did not include an idea of a judicial supervisory organ.

[Public hearing of 10 October 1962, afternoon]

Mr. President, I am still dealing with the Applicants' reply to our contention that Article 7 of the Mandate was not intended to introduce a form of judicial supervision into the Mandates system. The Applicants at page 459 **(I)** of their Observations make the statement that "It is significant that the authors of the Mandates system included a supreme judicial power within the organic structure of that system". But this statement, we say, is far removed from the realities of the situation. As I have already indicated, the authors of the Mandates system described the structure of that system and prescribed the supervisory machinery for the system in Article 22 of the Covenant, which, as I have indicated, makes no mention of a judicial power, supreme or otherwise. In fact, as far as we are aware there was not even any discussion with regard to judicial power or judicial supervision when the Mandates system was planned, that is, before and at the time of drafting of the Covenant.

If the compulsory jurisdiction clause in the Mandate instruments was intended to introduce a form of judicial supervision, it would indeed mean that the Council of the League, which body was empowered to define only the degree of authority, control or administration to be exercised by the Mandatory in each case, and which body purported, according to the preamble in each of the Mandate instruments, to do only that, in fact went further; that it exceeded its authority and created supervisory machinery for the Mandates system not contemplated by the authors of that system; and moreover, as Applicants wish to see it, machinery of superior authority to that prescribed by the authors of the system, namely, as the Applicants term it, a supreme judicial authority. Surely such a suggestion cannot be accepted as a matter of probability.

How do the Applicants proceed further in their argument? They say at page 459 **(I)** of their Observations that:

> "Mandatories were required to agree when a Mandate was conferred that disputes concerning the Mandate between themselves and another Member of the Organization to which they belonged would be submitted to the Permanent Court of International Justice."

Now of course the respective Mandatories did agree to the compulsory jurisdiction clause in each Mandate instrument. If that is what the Applicants intend to convey, we have no quarrel with regard to the statement. If, however, they intend something more than that, then we say it is without any justification.

Next, at page 459 **(I)** of the Observations, comes the statement of the Applicants that "The Court, itself, was, like the Mandates system, a creation of the Covenant". Now, how this fact supports the Applicants' contention is not clear to me.

They go on at page 459 to say that:

> "Far from objecting to the establishment of a supreme judicial authority, the Council not only accepted it as an ancillary of the Mandates System by 'confirming' the instrument in which it appeared, but also amended the original draft so that the Mandatory, and only the Mandatory, would be subject to compulsory jurisdiction at the instance of another Member of the League."

Now let us analyze the contentions wrapped up in this statement.

The fact that the Council confirmed each of the Mandate instruments with a compulsory jurisdiction clause in the text shows, of course, that it did not object to such a clause; but that the Council saw the purpose of that clause as the establishment of a supreme judicial authority or that it regarded the judicial authority provided for in the clause as an ancillary of the Mandates system is, of course, a view expressed by the Applicants without advancing any basis for it. The amendment by the Council of the draft compulsory jurisdiction clause referred to by the Applicants at that page is dealt with in the report submitted to the Council by Viscount Ishii. At page 459 **(I)** of the Observations there is a reference to this report and, with respect, I think it is a wrong reference. The first footnote at page 459 of the Observations is "See Report to the Council of the League of Nations submitted by Viscount Ishii, February 20, 1922, League of Nations Off. J., No. 7 (1922), p. 849 at 854". We find the report in the eighth *Official Journal* of that year at the very page to which the Applicants refer, and I want to quote from that report the portion that is material. It deals with Article 13 of what was proposed as the British draft Mandate for East Africa; and that portion of the report reads as follows:

> "The Council will perhaps desire to alter the first paragraph of this article so that it shall read as follows:
>
> '*The Mandatory agrees that any dispute whatever which may arise between himself and another Member of the League of Nations, relating to the interpretation or application of the provisions of the present mandate, which cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for in Article 14 of the Covenant of the League of Nations.*'
>
> A similar alteration has been made by the Council in the draft C mandates. It was inspired by the consideration that Members of the League other than the Mandatory could not be forced against their will to submit their differences to the Permanent Court of International Justice."

Now although the report does not record the wording of the relevant clause as originally drafted, the reasons advanced in the report for the suggested amendment are clear. The intention was that only Mandatories should, by virtue of the clause, be subject to the jurisdiction of the Court; but that does not indicate any intention to subject them to jurisdiction in the form of supervisory machinery. And the further conclusion which the Applicants draw from the fact that there was such an amendment, namely a conclusion that it was consistent with their fiduciary role that Mandatories were required to consent to the Court's jurisdiction, we say is unfounded, that is if it is intended to convey a notion of judicial supervision imposed for the benefit of the inhabitants of a Mandated territory. The Applicants, in fact, advance nothing in support of such a notion.

Also at page 459 **(I)** of the Observations the Applicants go on to say that "Compulsory jurisdiction in Mandate matters was instituted, then, for the same reason that the Mandatory was required to submit annual reports to the Council". Now this statement, advanced in the form of a conclusion, and presumably based upon what the Applicants had stated

in their Observations up to that point, is not only in conflict with the express provisions of Article 22 of the Covenant and with the other provisions of the Mandate itself, but we say it is not supported by any historical fact or circumstance—it rests purely and simply on the Applicants' own views as to the purpose of the clause in question.

Applicants develop their conclusion further by saying that the League

> "was not content to depend solely upon the conscience, or, indeed, the competence of the Mandatory for the proper exercise of the Mandate. Rather, it devised a system whereby the Mandatory's administration of the Mandated territory was made subject to the authority of the League and its Members to require the Mandatory to report, account, and, if necessary, submit to adjudication." (*Observations*, p. 459 **(I)**.)

Mr. President, this of course is a convenient way of telescoping certain provisions of Article 22 of the Covenant and certain provisions of the Mandate instrument. We submit, however, that there is no justification for doing so. In terms both of the Covenant and the Mandate instrument, the Mandate was to be exercised on behalf of the League and the Mandatory was obliged to report to the Council of the League. No authority or right of interference was conferred on individual League Members with regard to the Mandatory's duty to report and account. On the other hand, the compulsory jurisdiction clause specifically provided that the Mandatory would submit to the jurisdiction of the Court at the instance of another Member of the League, and then only in respect of disputes between the Mandatory as such and that other Member. No provision was made for the League to resort to judicial proceedings against the Mandatory, or to refer its disputes with the Mandatory for adjudication by the Court in contentious proceedings. By so telescoping the provisions relative to accounting to the League and the provisions of Article 7 of the Mandate, the Applicants attempt to claim rights for League Members which they were not intended to have. And they extend the provisions of Article 7 to the League as an organization. Again that is something which was not intended or expressed in the Mandate.

The Applicants also state that the Permanent Court was intended as an integral part of the system's supervisory machinery protecting the inhabitants, and that the authorities so classify and regard it; and further that each Member of the League, under the defined circumstances, was empowered to invoke the jurisdiction of the Court to ensure that the basic purpose of the Mandates system—the well-being and development of the inhabitants—would be fulfilled. Now, save for the reference to the views of the authorities, judicial and scholarly, which I will deal with later, this statement is a mere repetition of the Applicants' contention which I have already dealt with, and there is nothing advanced in support of it.

As an indication of the intention of the authors of the Mandate system, the Applicants draw attention at page 459 **(I)** of their Observations to the fact that in one of the Mandate instruments, namely that for the Mandated territory of Tanganyika, there appeared an additional paragraph which provided that Members of the League could bring before the Court claims on behalf of their nationals for infractions of their rights under that particular Mandate.

Now the Applicants say that as a matter of history this additional paragraph appeared in all the Mandate instruments and that at some stage before the final confirmation of the Mandates—though it cannot be established at what particular stage—the additional paragraph was excised from all the Mandate instruments save that of the Mandate for Tanganyika. "This history", the Applicants say further, "creates profound difficulty for Respondent's contention that a 'material interest' of a State, or its nationals, must be affected before the compromissory clause may be invoked since it demonstrates that there was at least some original thought that the general paragraph did not provide for the claims of nationals at all." (*Observations*, p. 460 **(I)**.) In this respect the Applicants also refer to the views expressed by two Judges of the Permanent Court in the *Mavrommatis* case, the Judges being Judge de Bustamante and Judge Oda, their view being that "Members of the League were not empowered under the compromissory clauses, lacking the addidional paragraph continued *[sic]* in the East Africa Mandate, to protect the rights of their own nationals before the Court, but could protect only interests of a general nature". (*Observations*, p. 459 **(I)**.)

Now, in the first place, we say that the history of the additional paragraph found in the Tanganyika Mandate is not clear. It is not even clear whether the additional paragraph was originally inserted in all the Mandates, including the C Mandates, and later excised from all but the Mandate for Tanganyika, or whether it originally appeared only in the B Mandates, or for that matter only in the Mandate for Tanganyika. It will be noted that the Applicants do not refer to any writings or any record of history for their statement at page 460 **(I)** of the Observations to the effect that the additional clause originally appeared in all the Mandates and was later excised from all except the Mandate for Tanganyika.

However, even if the Applicants' statement is correct in so far as the history goes, we submit that no conclusion which supports the Applicants' general contention can be drawn therefrom.

I will deal later with the *Mavrommatis* case and the views expressed by the majority, as well as the dissenting judges, in that case. At this stage I wish merely to mention the fact that the majority decision in that case was to the effect that the compulsory jurisdiction clause in the Mandate for Palestine, which did not include the additional paragraph, allowed for the protection by Members of the League of the rights of their nationals.

But even if it is conceded that there may have been some original thought to the contrary, that does not mean that the compulsory jurisdiction clause in the form in which it appears in all the Mandates, and without the additional paragraph found in the Mandate for Tanganyika, was intended to be invoked for the protection of the interests of the inhabitants of Mandated territories. Apart from the individual rights of their nationals, States, as such, also have rights. Although the chapter of history referred to by the Applicants may have a bearing on the question whether it was intended that Member States should be entitled to enforce the claims of their nationals, it has no bearing on, and does not refute, our contention that Member States were intended to invoke the compulsory jurisdiction clause in assertion of their own rights in matters affecting their material interests, and that the clause was not intended for espousing the cause of the inhabitants of Mandated territories.

Also under the heading "The Purpose and History of the Compromissory Clause in the Mandate System" Applicants comment, at page 460 **(I)** of their Observations, upon certain arguments advanced by us in support of the contention that the probabilities are against the creation by means of the compulsory jurisdiction clause of a system of judicial supervision.

In response to our submission that to assume a need for judicial supervision would have been tantamount to an acknowledgment in advance by the Council of the League of probable failure by it to perform adequately the supervisory functions entrusted to it, the Applicants say that "judicial recourse implies no distrust of administrative supervision. On the contrary, its purpose in the Mandates system is to enforce the Mandate through contentious proceedings, a power not vested in the administrative or executive organs". (*Observations*, p. 460 **(I)**.)

This line of reasoning by the Applicants proceeds on their assumption that the authors of the Mandate system must have considered it essential that Mandates be enforceable through contentious proceedings. Working on this assumption, the Applicants point to the fact that the only method of initiating contentious proceedings is through States, for, as they say, only States may be parties to such proceedings; and therefore, say the Applicants, the purpose of the compulsory jurisdiction clause in the Mandate is to enforce the Mandate through contentious proceedings. Building further on their initial premise, Applicants say that States are not custodians, that their right to institute judicial proceedings is not an interference with the policies adopted by the Mandatories, that the "State does not supervise; the State, rather, requests the Court to adjudicate a dispute. In doing so it may act as the instrumentality by which the Supervisory Organization as a whole may obtain a binding decision by a contentious proceeding." (*Observations*, p. 460 **(I)**.)

How far is this argument not removed from the realities of the legal situation as provided for in the Covenant and the Mandate instruments?

In the first place, as regards Applicants' assumption, Article 22 of the Covenant, which prescribed the securities for the performance of the sacred trust, made no provision for enforcement of the Mandate through contentious proceedings, nor does the Mandate instrument.

Secondly, the compulsory jurisdiction clause made provision for adjudication of disputes existing between a Mandatory and another Member of the League of Nations; it made no provision for differences which could exist between the Mandatory and the organs of the League.

And finally, there is no provision indicating an intention that the League, as the supervisory organization, should be entitled to obtain a decision in contentious proceedings through the instrumentality of a Member of the League of Nations.

The compulsory jurisdiction clause did not subject individual League Members to the Council's decisions concerning Mandate administration, and if that clause brought into existence a form of judicial supervision, then we say there is justification in our comment that individual League Members would stand in the position of custodians of the rights of the inhabitants of Mandated territories, that they could interfere in Mandate administration, and that so, even in disregard of the decisions of the Council.

The Applicants' reply to our argument that if there was a form of judicial supervision a Mandatory might satisfy the Mandates Commission and yet be attacked judicially by individual Members on the same point

is that this underlines the importance of the judicial jurisdiction in order to obviate unresolved disputes between the Mandatory, on the one hand, and Member States on the other.

This, of course, is no argument in answer to our complaint. Nor is it an answer to say, as the Applicants further do, that if the Mandatory's position in such a dispute were to be based upon decisions or policies of the Council and the Commission, the Court would no doubt give due weight to such a record. No doubt the Court *would* take into consideration the decisions of the Council and/or the views of the Commission, but that would not resolve the difficulty foreseen by us.

The Court would, in such a case, still have to decide between the opposed contentions, and the possibility of a decision against the Mandatory, even though its policies may be favoured by the Council, cannot be ruled out. And furthermore, even though the Court may, in such a case, find in favour of a Mandatory, there would still have been the expense and inconvenience involved in contentious proceedings.

Mr. President, in our written Objections it was contended, at pages 384-385 **(I)**, that on analysis of the functions of the various organs of the League in its supervision of Mandate administration, and the implications resulting therefrom, there is support for our denial of the contention that the Court was intended to act as an independent supervisory authority at the instance of individual League Members. In this respect, we drew attention, as I have also done in the present argument, to the limitation of powers of the Mandates Commission and of the General Assembly of the League relative to Mandate administration, and we indicated that if the compulsory jurisdiction clause was intended to provide a form of judicial supervision, then, with regard to Mandate administration, it would mean that the powers of individual League Members far exceeded those of both the Mandates Commission and the General Assembly.

How do the Applicants react to that contention? We find their reaction at page 461 **(I)** of the Observations where they say:

> "So far as concerns Respondent's implied criticism that the Court might be induced 'to act as an independent supervisory authority', the fact is that only one contentious case, prior to the instant cases, was instituted under the compromissory clauses of the several Mandates, and that the instant cases were brought only after years of unavailing negotiations with Respondent."

Now the prior case referred to by them is, of course, the *Mavrommatis* case, a case in which a Member State espoused the claim of its own national and did not appear in the role of a custodian on behalf of the inhabitants of a Mandated territory.

The fact that, in addition to the *Mavrommatis* case, the present cases are the only ones yet brought to Court under the compulsory jurisdiction clauses of the several Mandates is no proof of judicious exercise of the alleged right to invoke judicial supervision. No State, other than the Applicants in the present case, have ever claimed *locus standi* before the Court as the protector and custodian of the rights of inhabitants of Mandated territories.

A further reply by the Applicants, on the very same page—461 **(I)** of the Observations—is:

> "Respondent's fear that the Court would be improperly used, or that the threat of proceedings would be used, minimizes the im-

> portance of the requirement that under Article 7 the Court may entertain only disputes that 'cannot be settled by negotiations'. *This is an explicit bar to improper or excessive use of the compromissory clause.*"

I must say that Respondent's own experience with regard to negotiations in the present conflict hardly bears this out. Though invited to negotiate with regard to the position of South West Africa, it has, at the same time, been made clear to Respondent that the majority of States in the United Nations would not be satisfied with any settlement of the conflict which would not result in the territory being brought within the United Nations Trusteeship system; and, Mr. President, that is so despite the Court's Opinion that Respondent was not obliged to do so. This is a matter which I will develop fully in connection with our Fourth Objection; I merely mention it here relative to the suggestion that negotiation, or the requirement for negotiation, would be a bar to the improper use of the compulsory jurisdiction clause.

At page 461 (I) of the Observations, Quincy Wright is relied upon by the Applicants for the proposition that the League organs were not all eventually responsible to a supreme authority, but were mutually independent. This, I must say, is rather in discord with the Applicants' own description of the Court at page 459 of the Observations, where they refer to the Court as the "supreme judicial power", and the "supreme judicial authority, within the organic structure of the Mandates system".

In any event, even accepting Wright's statement of the position to be correct, how does that justify the conclusion drawn by the Applicants, at page 461 of their Observations, that the "principal role of the Court is to adjudicate disputes brought to it, within the terms of the compromissory clauses by Members of the League, when administrative resources have been fully, and, as in the instant cases, exhaustively *employed*".

That clause itself does not refer to administrative resources at all, nor is there any indication in the Mandate instrument that the right to invoke the clause was to be dependent in any way upon prior administrative action. The clause, of course, requires prior negotiation, but negotiation with regard to disputes existing between the Mandatory and another Member of the League of Nations, and not with regard to a possible difference between the Mandatory and the Council, or, for that matter, any other organ of the League.

Upon the Applicants' contention, the compulsory jurisdiction clause, in order to ensure for the Court the role which Applicants ascribe to it in the Mandates system, would have to be construed as if it provided something like this—I have formulated the words which I think would be required to meet with the Applicants' description of the functions of the Court—it would read this way, I think:

"If any dispute whatever should arise between the Mandatory and the Council of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute, if it cannot be settled by the administrative resources of the League of Nations, shall be submitted to the Court by any Member of the League acting for and on behalf of the League."

Now, with respect, Mr. President, the clause does not so provide.

In support of our contention that the Court was not meant to function as a supervisory authority in Mandate administration, we stated, at pages 386-387 (I) of our Objections, that it is unlikely that the Council of the League and the Mandatories intended that the Court should pronounce on matters of policy affecting the material and moral well-being and social progress of the inhabitants as this could involve decisions of a purely political character normally considered to be outside the functions of courts of law. This is a point of particular importance in the instant cases, where the matters alleged to be in conflict centre around political issues, and where the Court is invited to pronounce on Respondent's policies of government in South West Africa. The Applicants' reply to our contention is at pages 461-462 (I) of their Observations, and it is to this effect, that "while Article 2 [of the Mandate] is broad in scope, it must be remembered that in interpreting and applying it the Court would have the advantage of the particular standards set forth in the other Articles of the Mandate and in the Covenant". They say, further:

> "These standards were the distillation of a century or more of experience in colonial administration and were included in the constitutional documents of the Mandates System, because the ideals they expressed were being put into practice by the System itself. The Court, therefore, would have, in interpreting and applying the Mandate, a framework of law, doctrine, and practice upon which to rely." (*Observations*, p. 462 (**I**).)

Now, the Applicants have omitted to state where these particular standards, or norms, are to be found in these documents. Article 23 of the Covenant did contain provisions with regard to the treatment of native inhabitants. We find the provisions there to read as follows (Article 23, paragraph *(b)*, of the Covenant):

> "Subject to, and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:
>
> *(b)* undertake to secure the just treatment of the native inhabitants of territories under their control."

Surely these wide provisions could, in no sense, serve as norms or standards in determining whether particular legislative measures or administrative acts are in conflict with the provisions of Article 2 of the Mandate. The Mandate instruments, like Article 22 of the Covenant, also contained provisions intended to operate as safeguards in the interests of the inhabitants of Mandated territories. We find such provisions relating, for instance, to the prohibition of the slave trade, forced labour, traffic in arms, traffic in liquor, and the like. If these provisions constitute the standards referred to by the Applicants, then it is difficult to see how these so-called standards could be of any assistance to the Court in a consideration of the propriety, wisdom or soundness of legislative measures and administrative acts which do not touch upon and, are not in conflict with, the provisions intended to prevent particular named abuses and vices.

If, however, these provisions in the Mandate instruments are not the standards to which the Applicants refer, then, with respect, we would like to know what are those standards which, in the Applicants' language, constitute a "framework of law, doctrine and practice", and we would like

to know where they are to be found in the Mandate instrument or in the Covenant.

The Applicants go on to say that, although the words "material and moral well-being" in Article 22 of the Covenant are broad in scope, they embody meaningful norms in the context of the subject to which they pertain. They say that "in the international society, the norms applicable to the 'administration of territories whose peoples have not yet attained a full measure of self-government' reflect the consensus of all the Members of the United Nations" (*Observations*, p. 462 **(I)**) and they say that these norms include principles and doctrines recorded in Articles 73 and 76 of the United Nations Charter. Now, if one looks at the Articles referred to, as they are dealt with and quoted at page 462 of the Observations, one finds that they provide for the following:

> "... to promote to the utmost ... the well-being of the inhabitants of these territories, and, to this end:
>
> *a.* to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> *b.* to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement..."

Of course, Mr. President, the answer to this line of reasoning presents itself. In considering as a matter of probability whether the Council of the League and the respective Mandatories intended, when the Mandates were framed in the year 1920, that the Court should be involved in political disputes, it is, of course, out of place to have regard to the Articles of the United Nations Charter which were framed some 25 years later. They can be of no assistance to interpret or to ascertain the intentions of the authors of the Mandate system. In any event, the provisions of the Charter to which the Applicants refer are broad statements of policy which can hardly serve as standards or norms in considering the propriety or expediency of legislative measures or administrative acts of a Mandatory.

Mr. President, at page 384 **(I)** of the written Objections we stated that a form of judicial supervision was not necessary inasmuch as the League was fully empowered to deal with all matters pertaining to the administration of Mandated territories, and that the League could, with regard to any legal question concerning the interpretation or application of the provisions of the Mandate, have obtained an advisory opinion from the Court. The reaction of the Applicants to that statement is found at page 462 **(I)** of their Observations, where they say this:

> "In the light of its refusal to accept and implement this Court's Advisory Opinion of 1950, Respondent's argument that compulsory jurisdiction is not needed for disputes involving the welfare of the inhabitants because the Council of the League could itself request an advisory opinion from the Court, has a somewhat ironic ring."

Now, Mr. President, the Court's 1950 Opinion was obtained with regard to the international status of South West Africa as a result of the happening of events not foreseen by the authors of the Mandates

system. Respondent has advanced reasons, and in our respectful submission, valid reasons, why it could not accept the 1950 Opinion *in toto*—surely a right which Respondent has in terms of the Charter and the Statute of the Court. Respondent's conduct does not detract from the argument that in the foresight of the authors of the Mandates system, there was no need for judicial supervision, and that such a form of supervision was not intended.

The Applicants proceed, at pages 462-463 **(I)** of the Observations, to say:

> "The cases at bar are perhaps the strongest vindication of the foresight of the founders of the Mandates System in providing for contentious proceedings against a Mandatory to enforce the provisions of the Mandates for the benefit of inhabitants of Mandated territories."

Of course, this is a question begging argument formulated on the prior acceptance of the correctness of the Applicants' contention. Their case is that the Court has jurisdiction in the present proceedings. They conveniently accept that their case is made out; and if the Court has jurisdiction, then there must be attributed to the founders of the Mandates system a foresight of the events following upon the dissolution of the League. Once having attributed such foresight, then of course the present cases serve in vindication of the attributed foresight.

Finally, say the Applicants at page 463 **(I)** of their Observations:

> "The purpose of the Mandates System, its organizational structure, and its experience support the judgment of Norman Bentwich to the effect that the Court...",

and they quote Norman Bentwich:

> "[The Court] stands there, behind, as it were, the Mandates Commission and the Council of the League, as the *supreme guardian* of the rights of nations in the fulfilment of the international trust which is conferred on the Mandatory, and as the embodiment of international justice. It is the Palladium of justice in the development of the Mandated countries, just as the Mandates Commission is the Areopagus."

Against that, Mr. President, we submit that an analysis of the Applicants' argument reveals that nothing in fact has been advanced in their Observations, either as a matter of history or as a matter of probability, which lends support to the contention that individual League Members were intended to have a legal interest in the observance by Mandatories of the obligations imposed for the benefit of inhabitants of Mandated territories, or, that the Court was intended to serve at the instance of individual League Members as a supervisory authority, or, in the words of Bentwich, as a supreme guardian in the structure of the Mandates system. On the contrary, not only the probabilities point the other way, but also the very provisions of the Covenant and the Mandate instruments. In terms of these documents, as I have indicated, there is no provision for nor any contemplation of a form of judicial supervision as one of the securities for the due performance of the sacred trust of civilization.

I come now to a part of the Applicants' Observations headed: "The Weight of Authority", and there they deal with judicial and scholarly authority, in that order, as from pages 463-471 **(I)** of the Observations.

Under judicial authority they first refer to the *Mavrommatis* case. Before dealing with that case I must draw attention to a misstatement at page 457 **(I)** of the Applicants' Observations with regard to the reliance placed by Respondent upon the judgment in that case. At that page of their Observations (457), we find this statement: "In support of its position, Respondent cites the *Mavrommatis* case...", and they refer to another case and other writers also. In any event, in so far as the reference is to the *Mavrommatis* case, that that is cited by Respondent in support of its case, we say the statement is not correct. To put the matter in its true perspective, it is necessary for us to turn back to the Applicants' Memorials, at page 92 **(I)**. There the Applicants ventured the bald statement that "in the *Mavrommatis* case, the Court took it for granted that Article 26 of the Palestine Mandate ... embraced disputes pertaining to the welfare of the inhabitants of the Mandated territory".

We could not agree with that statement, and took the matter up at page 390 **(I)** of our written Objections. We pointed out there that "nowhere in the written Judgment of the Majority of the Court [in the *Mavrommatis* case] is there the least indication of support for the Applicants' statement that the Court took it for granted that the compulsory jurisdiction clause embraced disputes pertaining to the welfare of the inhabitants of the Mandated territory".

We indicated there also that indeed a contrary view on the part of the majority is suggested in a portion of the judgment where it was accepted that Member States could renounce the rights conferred on them in the Mandate instruments, and presumably therefore also the right to submit disputes to the Court, which, as we went on to show, in the opinion of Schwarzenberger conflicts with the idea that the compulsory jurisdiction clause was intended to serve the interests of inhabitants of Mandated territories.

Attention was also drawn by us to the fact that out of the five dissenting Judges, only two, namely Judges de Bustamante and Oda, expressed views in their separate Opinions which can be regarded as supporting the contention of the Applicants.

The Applicants again take up the matter at page 463 **(I)** of their Observations, where they discuss the *Mavrommatis* case. There it will be noticed that they expound the issues in that case, and say:

> "... one of the key issues before the Permanent Court was whether jurisdiction was defeated because the Applicant was espousing the claim of one of its nationals against the Mandatory". (*Observations*, p. 463 **(I)**.)

We agree with that statement regarding the issues expounded in the case. They go on to say that in holding that the dispute was subject to the compromissory clause, the Court emphasized that as the language of the clause was as comprehensive as possible, the dispute may be of any nature provided it related to the interpretation or application of the provisions of the Mandate.

Now, again we agree with this statement, but we must at the same time draw attention to the fact that in the judgment of the Court in the *Mavrommatis* case a legal right or legal interest on the part of the Applicant in the matter in conflict was regarded as a necessary requirement for a dispute to be justiciable as such.

This aspect, though fully dealt with by us at pages 377-379 **(I)** of our

Objections, is not touched upon by the Applicants in their Observations. We must therefore conclude that our submission in that respect is not contested by the Applicants.

Applicants say further, with regard to the *Mavrommatis* case, at the bottom of page 463 (I) of the Observations:

> "The significance of the Court's holding is not that the right of Greece to espouse the claim of her national was recognized, so much as that the right of espousal was strongly resisted and the Permanent Court was divided on the question. In other words, there was doubt on the part of certain Members of the Court that the compromissory clause was applicable at all to disputes concerning nationals of Member States. Respondent, on the contrary, contends that this is one of the two *major* purposes for the clause."

First of all, for the purposes of our contention, no significance attaches to the question whether the interests of Member States alone or of Member States and their nationals are contemplated by the clause. In any event, the *Mavrommatis* case at least, in so far as the majority opinion is concerned, is clear authority for the proposition that the compulsory jurisdiction clause was intended to serve the interests of the nationals of Member States and *a fortiori*, we say, the interests of Member States themselves. Respondent contends that these were the only purposes for the clause, and not, as the Applicants reproduce Respondent's contention, namely, the two *major* purposes for the clause.

The Court in the *Mavrommatis* case was not called upon to decide whether any other purpose was intended for the clause: for instance whether, in addition to the purposes which I have just stated, it was intended to embrace disputes pertaining to the welfare of the inhabitants; and the majority in the *Mavrommatis* case did not express themselves thereon.

The Applicants submit, nevertheless, at page 464 (I) of their Observations:

> "from a reading of the Minority Opinions and the broad scope of the Majority Opinion, Applicants submit that it was taken as axiomatic by the Court that Article 26 of the Palestine Mandate (the counterpart to Article 7) embraced disputes pertaining to the welfare of the inhabitants of Mandated territories".

I repeat what we have contended in the written Objections, that nothing in the majority opinion in that case permits of such a conclusion, but that on the contrary, the fact that the majority regarded the rights of individual States under the Mandate as renounceable, suggests a view that the compulsory jurisdiction clause was not intended to introduce a form of judicial supervision. And incidentally, this last point is not touched upon by the Applicants at all in their Observations.

As to the minority in the *Mavrommatis* case, there were five dissenting opinions. Lord Finlay, at pages 42 to 43 of the reported judgment, indicated the class of case which in his opinion the compulsory jurisdiction clause was, primarily at all events, intended to meet, and he did not include therein actions in the interests of the inhabitants. Judge Moore did not deal with the question now under consideration, and Judge Pessôa, at page 38 of the report, expressed the view that the Court could not in terms of the compulsory jurisdiction clause "be called

upon to protect the rights of *individuals*, but only those of *States*"; and that is a view which does not support the Applicants' contention.

Only two of the Judges in the *Mavrommatis* case, namely, Judges de Bustamante and Oda) expressed views in the passages from their opinions cited at page 464 of the Observations which can be regarded as supporting the Applicant's contention. But Mr. President, even that is doubtful, because these Judges refer to applications with a view to the protection of general interests, and acts of a general nature affecting the public interest, without mention at all of the inhabitants of the Mandated territory.

Mr. President, if regard is then had to what is said in the pleadings regarding the *Mavrommatis* case, that is in the Memorial of the Applicants, and our written Objections, it will be clear that we did not cite the *Mavrommatis* case in support of our contention. It was the Applicants who, in the first instance, referred to the case in support of their contention, and we dealt with, and refuted, that proposition by the Applicants.

In their Observations, in further support of their contention, the Applicants also quote at page 465 **(I)** of their Observations an extract from the dissenting Opinion of Judge Nyholm in the third *Mavrommatis* case, that is the case of "*The Readaptation of the Mavrommatis Jerusalem Concessions*—the reference of the report is Series A, No. 11 of October 10th, 1927—and this is what the Applicants say with regard to a certain passage appearing in the Opinion of Judge Nyholm; the Applicants say, at page 465 **(I)**:

> "Speaking in the third *Mavrommatis* decision, Judge Nyholm emphasized that the Court's supervisory jurisdiction constitutes a form of 'guarantee' that Mandatories would 'act in accordance with the principles adopted in the interests of the community of nations by the Covenant'. He said:
>
> > '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.' "

If regard is had to the Opinion of Judge Nyholm, one finds that he nowhere speaks of supervisory jurisdiction. What the Applicants have done, in our submission, is to extract from Judge Nyholm's Opinion certain words and sentences which, read out of context, could bear the meaning contended for by the Applicants and could be read in support of their contention; but if these words and phrases, or words and sentences are put back into context, and are read in the context, they do not support the Applicants' contention, On the contrary, I submit they underwrite the Respondent's contention. This is what Judge Nyholm said, if one starts reading the Opinion at a stage before the passage extracted by the Applicants. He was dealing with Article 26 of the Mandate for Palestine, the jurisdiction clause in that Mandate, and said, (at page 25 of the Report):

> "In order to determine the scope of the jurisdiction obtained by the Court from the Mandate for Palestine, which is the sole source of the Court's jurisdiction to consider the Mandate, regard must be had (1) to the character of the Mandate and especially to the reasons which led the League of Nations to insert in the Mandate a clause giving jurisdiction to the Permanent Court of International

Justice, and (2) to the structure of the Mandate in order to ascertain in what manner, by which Articles of the Mandate, and within what limits, this jurisdiction has been established... as regards the first point, the historical development of the Mandate system shows that the mandatory Powers were to carry out this task under the control of the League of Nations to which they were bound to submit annual reports." (P.C.I.J., Series A, No. 11, 10th October, 1927, p. 25.)

It is to be noted that with regard to the control over Mandates the learned Judge mentioned only the League and not the Court.

The Opinion goes on as follows:

"The institution of this control was due to the fact that the Powers did not wish to leave a mandatory at liberty to govern a mandated territory entirely at its discretion. Certain limits were to be fixed, not only with a view to harmonizing the principles established under the various mandates, but also with a view to establishing special rules in regard to each country, that is to say, a guarantee that the administration should act in accordance with the principles adopted in the interests of the community of nations by the Covenant." (P.C.I.J., Series A, No. 11, 10th October, 1927, p. 26.)

It is to be observed that Judge Nyholm was speaking of a guarantee *not* with regard to the interests of inhabitants of Mandated territories but with regard to the interests of the community of nations, i.e. the Members of the League. He went on to say:

"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." (P.C.I.J., Series A, No. 11, 10th October, 1927, p. 26.)

And then follows the extract quoted by the Applicants:

"Mandatories were not to infringe the rights either of States or of individuals. Each State therefore has the right of control which it may exercise by applying to the Court." (P.C.I.J., Series A, No. 11, 10th October, 1927, p. 26.)

Now Mr. President, the quotation should not have stopped there if one is to understand correctly what the learned Judge was expressing as his view because the Opinion goes on to say:

"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." (P.C.I.J., Series A, No. 11, 10th October, 1927, p. 26.)

In the language then of Judge Nyholm, the purpose of the compulsory jurisdiction clause was to serve the interests of States and of their subjects. Nothing in his Opinion suggests that the Court's jurisdiction was meant for supervision of Mandate administration in the interests of inhabitants of Mandated territories.

We turn next to the case of *Jerusalem-Jaffa District Governor and another* v. *Suleiman Murra and others*. At pages 386 and 387 **(I)** of the

written Objections, we advanced an argument with reference to this particular case, and this is what we said, at the bottom of page 386 **(I)**:

> "The functions of Courts of Law do not normally extend to the realm of politics; and where a legislature or an administrative body acts within the scope of powers conferred upon it, it is not the function of Courts of Law to enquire into the policy or soundness of its acts.
>
> This general principle was recognized in the case of *Jerusalem-Jaffa District Governor and another* v. *Suleiman Murra and others*, as being applicable also in regard to the administration of the Mandated Territory of Palestine under that Mandate. In regard to certain measures of expropriation applied by the Mandatory, the Privy Council stated:
>
> > 'Their Lordships agree that in such a case, and in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation. But this depends not upon any civil right, but (as the Chief Justice said) upon principles of sound legislation; and it cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice'."

Now the Applicants' comment at page 465 **(I)** of their Observations is that we have "not read the *Jerusalem* decision correctly. In fact, the case stands for the opposite of the proposition advanced by Respondent", because they say in that case the Court was called upon to pronounce on an administrative act of the Mandatory and did so after interpreting Article 2 of the Mandate for Palestine.

As to the particular passage in the judgment which I have just now read, and which was cited by us in the Preliminary Objections, the Applicants say the following, at page 466 of their Observations:

> "Only after finding that there was no statutory basis for reversing the administrative act did the Court employ the language quoted by Respondent. That language has no special significance; it is the expression of a policy followed by all courts, namely, that courts of law do not legislate. But where legislation exists—as in the Mandate—courts will examine challenged administrative acts to determine whether such acts violate the legislation."

Mr. President, with respect, I submit that we have *not* misread the *Jerusalem* case. I submit that our understanding of the issues in that case, and of the Court's finding, is correct as we dealt with the case in our Preliminary Objections. The Court, in that case, was called upon to decide whether a particular expropriation ordinance operating in Palestine—an ordinance called the Urtas Spring Ordinance—was within the scope of powers conferred by an Order in Council. That Order in Council authorized the High Commissioner to promulgate ordinances as might be necessary for the peace, order and good government of Palestine, subject to a condition that no ordinance should be promulgated which should be in any way repugnant to or inconsistent with the Mandate.

In order to decide whether the particular ordinance fell within the conferred powers, the Court had to interpret and apply a particular provision in the Mandate for Palestine. The Court having done so, found that the ordinance was not repugnant to or inconsistent with the provisions of the Mandate and therefore, within the powers conferred by the Order in Council. Having so found, the Court used the language which we quoted at page 387 **(I)** of our Objections and which I have just read.

We assert that, contrary to the Applicants' statement, this particular passage from the judgment has significance, and that it supports our proposition that where a legislature or administrative body acts within the scope of powers conferred upon it, it is not the function of courts of law to enquire into the policy or soundness of its acts—that is whether such acts are conducive to peace, order and good government.

Although the Court was in a position to decide in the *Jerusalem* case that the expropriation ordinance in question was not repugnant to a particular provision in the Palestine Mandate which required the Mandatory to safeguard the civil and the religious rights of the inhabitants of Palestine irrespective of race and religion, that does not, I submit, detract from our argument; our argument being that as a matter of probability it was not intended by the authors of the Mandates system that the Court should, at the instance of a Member of the League, enquire into the policy and soundness of the Mandatory's legislative acts and administrative measures in order to decide whether they conformed with the general provisions in the Mandate, those general provisions requiring that the Mandatory shall promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory. And I submit that the passage quoted by us from the case which I have just referred to supports the proposition which I have just stated.

[Public hearing of 11 October 1962, morning]

Mr. President, I am still busy with the Applicants' Observations relative to our third Objection. At page 466 **(I)** of the Observations the Applicants pass to a consideration of scholarly authority and they make the following statement:

> "Respondent cites four writers to support its limited view of 'interest' as a basis for invoking judicial supervision: Feinberg, Judge McNair, Wessels, and Schwarzenberger."

Now, Mr. President, this statement is not entirely correct. We did refer to these writers in the written Objections at page 390 **(I)**, but the submission there made was this, and I read from that page; referring to the four writers that the Applicants have mentioned, we said the following:

> "Other scholars who have written on the subject either hold the view that the provision in question does not confer jurisdiction in a matter in which the particular Member State has neither personally nor through its subjects a material interest, or raise doubts thereanent."

And secondly, we have not conceded, but on the contrary have denied, that any form of so-called judicial supervision exists by virtue of the compulsory jurisdiction clause.

Now, in the Observations, at page 466 (I), the Applicants deal first with the views of the author Feinberg, who they say takes the position that a Member State can invoke the jurisdiction clause against the Mandatory only when the interest of a Member State or its nationals has been harmed by a violation of the terms of the Mandate. But, say the Applicants, Feinberg has a broader concept of interest than Respondent, in that he quotes, with approval, Salvioli, to the effect that it is not possible to determine in a precise manner the nature of an interest sufficient to justify proceedings before the Court and that the sufficiency of interest must be decided in each case. And, say the Applicants, Feinberg also quotes Salvioli with approval for discussing and underlining the case of *The S.S. Wimbledon*, in which connection Feinberg says that the Court there conceded that even a moral interest could be sufficient to found jurisdiction; and he suggests that the same liberal view should also be adopted in the application of the jurisdiction clause of Mandates.

Now, from Feinberg's treatment of the matter, one thing is clear, in our submission, and that is that he viewed the compulsory jurisdiction clause as a provision securing the interests of Member States and their nationals, and not as the Applicants wish to see the clause interpreted, that is, as existing, primarily in any event, for the benefit of the inhabitants of Mandated territories. The very example Feinberg uses in the quotation found in the Observations is demonstrative of that view, namely the concern displayed by a Member State for the interests of its own Jewish population, and by reason of having a large number of Jews in its population, also its own interest in the administration of the Mandate for Palestine which contained provisions relating to a Jewish National Home in Palestine.

In any event, in so far as Feinberg relies on the case of *The S.S. Wimbledon* as authority for the proposition that a fairly wide interpretation of the conception of interest should be adopted, even so wide as to embrace a moral interest, we say that the Judgment in the case of *The S.S. Wimbledon* does not stand for that proposition.

In the case of *The S.S. Wimbledon*, the Court allowed certain States who were not immediate parties to the dispute to participate in the proceedings; but not on the basis of merely a moral interest. The basis on which the Court allowed such States to participate was dealt with by the Court at page 20 of the reported Judgment, and there the Court said:

> "The Court has no doubt that it can take cognizance of the Application instituting proceedings in the form in which it has been submitted. It will suffice to observe, for the purposes of this case, that each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags. They are, therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, paragraph 1, of which is as follows:
>
> > '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, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations'."

Certain States, then, were allowed to appear as co-Applicants by virtue of the fact, as the Court said, that they each had a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possessed fleets and merchant vessels flying their respective flags and therefore, although unable to adduce actual prejudice to any pecuniary interest, they were covered by Article 386 of the Treaty of Versailles. The interest of such States, as the Court saw it, was not moral but in fact material. Although they suffered no pecuniary losses as a result of the breach complained of, they were at least potentially affected in their material interests.

In that same case, another State, namely Poland, was allowed to intervene in the proceedings by virtue of the provisions of Article 63 of the Statute of the Permanent Court. That Article enabled States who were parties to a convention to intervene in proceedings where the construction of the convention was in question. And again that was not a case of a moral interest.

The Applicants deal next with the writings of Judge McNair. We had referred at page 390 (I) of the Objections to an article by him in the 1928 *Cambridge Law Journal*. We pointed out that in the article the learned author dealt with the jurisdiction clause in the Mandates, and this is what he said with regard thereto, in a footnote at page 157 of the article in the *Cambridge Law Journal*, Volume III, of the year 1928:

> "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*, Publications of the Court, Series A, No. 2."

and the learned author then proceeded:

> "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 interest to protect, but merely seeking the faithful observance of the terms of the Mandate?"

The Applicants say that whatever doubt the learned Judge might have entertained as to the purpose of the compulsory jurisdiction clause when he wrote on the Mandates in 1928, had obviously been resolved in his mind when he rendered his separate Opinion in the 1950 Advisory Proceedings. In that Opinion, the Applicants say, he stressed that every State which was a Member of the League at the time of its dissolution still had a legal interest in the proper exercise of the Mandate, and stated that this legal interest may be invoked to effectuate the judicial supervision of the Mandate.

In the Objection now being dealt with, we are not concerned with Judge McNair's view that the interests of Member States survived the League because the expression "another Member of the League of Nations" in Article 7 of the Mandate, as the Judge held, was merely descriptive. We have already dealt with that aspect of the Judge's Opinion and for the present argument it is assumed that States who were Members of the League at its dissolution may still invoke the provisions of Article 7. In this Objection we are concerned only with the type of case for which the provisions of Article 7 were intended.

Now, the kind of disputes justiciable under Article 7 of the Mandate was not a matter specifically raised in the questions submitted to the Court for the Advisory Opinion in 1950, and it was not canvassed in argument. Judge McNair did not advance any reasons in his separate Opinion for the view that the compulsory jurisdiction clause involved judicial supervision of the administration of the Mandate—a matter which he had left open and in doubt when he wrote the article in 1928 that I have referred to.

Also at pages 468-469 (I) of their Observations, the Applicants quote from the writings of Bentwich, Quincy Wright, Hales, Judge Lauterpacht, Miss van Maanen-Helmer and Chowduri, in support of the Applicants' contention that the Court was meant to function as a judicial supervisory organ in the structure of the Mandate system. A proper study of the writings of these authors, we submit, reveals that only Bentwich and Chowduri appear to state that view with conviction.

The quotation from Wright appearing at page 468 (I) of the Applicants' Observations is but one of the several passages in the book devoted to the purpose of the jurisdiction clause, and we have indicated at page 389 (I) of our Objections that, following on that particular quotation, the learned author went on to deal with the fact that there was an additional clause in the Mandate for Tanganyika, and then ended the whole enquiry on the note that *it would seem* broad enough to cover claims presented by League Members on behalf of natives of the Mandated territories.

Also Hales in his work *The Creation and Application of the Mandates System*, which is referred to at page 468 (I) of the Observations, puts the matter no higher than that *it would appear* that a State Member of the League need not have any interest in the dispute except that of wanting to see a proper application of the provisions of the Mandate.

Judge Lauterpacht deals with the matter in a footnote at page 226 of his edition (that is the 8th edition) of Oppenheim's *International Law* where he states—and I read the footnote:

> "Although two Judges dissented from this part of the Opinion, the Court was unanimous in holding that *judicial* supervision continued and that, having regard to Article 7 of the Mandate and Article 37 of the Statute of the Court, the reference to the Permanent Court of International Justice was to be replaced by a reference to the International Court of Justice. It follows that at least those Members of the United Nations who were Members of the League of Nations are entitled to bring before the International Court of Justice any dispute relating to the interpretation or application of the provisions of the Mandate."

Though the learned author there used the words "judicial supervision", he was merely restating the Court's findings in the 1950 Opinion. We submit it would have been more correct if he had stated that the Court was unanimous in holding that Article 7 of the Mandate for South West Africa is still in force, because the majority of the Court expressed no views with regard to the kind of disputes justiciable under Article 7, nor did the majority use any expression conveying a notion of judicial supervision.

With regard to the views of Miss van Maanen-Helmer, the Applicants quote, also at pages 468 and 469 (I) of their Observations, a passage from her book on the Mandates system. This passage, we submit, in no way

supports the Applicants' contention that the jurisdiction clause introduced a form of judicial supervision. All that the learned author said, and I read from the passage quoted, is the following:

> "The fact that a case involving the interpretation of a mandate has been brought before the Court [she was referring to the *Mavrommatis* case] is an important precedent in that it shows that the status of a mandated territory is safeguarded by international law as well as by the supervision of the political institutions of the League of Nations." (van Maanen-Helmer, E. *The Mandate System in Relation to Africa and the Pacific Islands*, p. 158.)

Indeed, in the very same chapter of her book, at pages 169 to 170, Miss van Maanen-Helmer analyses supervisory functions in the Mandates System, and she makes no mention whatsoever of the Court or of the rights vested in individual League Members with regard to supervision. She concludes the chapter with a paragraph, at page 170, which reads as follows:

> "Thus the mandates system, with its two fundamental characteristics of the responsibility of the mandatories for administration and the responsibility of the League for supervision is essentially part of the system of international government instituted by the League of Nations."

So that there is nothing in her book at all which can be interpreted as a recognition of judicial supervision.

In our written Objections at pages 393-394 (I), there appeared the following statement:

> "Although the Court's function, under Article 7 of the Mandate, has colloquially been referred to as 'judicial supervision', it is not an exact legal description of that function."

In reply thereto, the Applicants say, at page 469 (I) of their Observations, that the expression "judicial supervision" was used, not only by Judges Lauterpacht, McNair and Read, and some of the other writers referred to by the Applicants, but was even used by Respondent's own representative before the United Nations forum, and they quote from a report of an address by the South African representative to the Fourth Committee in the year 1953. The Applicants say that there the Respondent demonstrated a broader appreciation of the need for, and significance of, judicial supervision.

Now, it is not correct to say that Respondent saw a need for, and significance of, judicial supervision. The South African representative was explaining to the Fourth Committee the negotiations which had taken place with the *ad hoc* Committee on South West Africa. According to his explanation, the suggestion to submit to judicial supervision came about, not because Respondent saw a need for such supervision, but because the *ad hoc* Committee desired that some provision should be made for international supervision. In fact a reference to the discussions with the *ad hoc* Committee, reported in United Nations Document A/AC 49/SR 7, shows that Respondent saw no need for any form of international supervision, judicial or otherwise. If one refers to that United Nations Document, one finds the following statement made by the South African representative, and I will only read an extract from this statement.

At page 4 of the document, to which I have referred, the following is found:

> "It was, however, the Union Government's view that no specific provisions for implementation were required since, in terms of international law, it would be impossible for the Union to evade the obligations assumed and since there would be adequate remedy for breaches of the agreement in existing international machinery. Moreover, civil contracts generally contained no provisions for compliance." (*U.N. Doc.* A/AC. 49/SR. 7, p. 4.)

And the South African representative went on to explain that if some form of supervision was desired, then South Africa would be prepared to accept judicial supervision.

Now, the fact that Respondent offered, in the course of those negotiations, to submit to judicial supervision and to accept, in that connection, the compulsory jurisdiction of the Court, must, we say, be viewed in its proper perspective. The offer, as explained by Respondent to the *ad hoc* Committee, entailed a legal obligation to submit to the jurisdiction of the Court, but not at the instance of any one of a large number of States, but at the instance of two out of three States, namely any two of the remaining Principal Allied and Associated Powers of the First World War, with whom the proposed agreement was to be concluded. And, secondly, there would be no concurrent supervision by an organization such as the League or the United Nations. In those circumstances, we say, most of the anomalies and implications which could arise under a system of dual supervision, that is a system of administrative and judicial supervision, as the Applicants ascribe to the Mandates system, would be avoided.

Finally, under the heading of scholarly authority, the Applicants in the Observations, again canvass the address of Respondent's representative, Dr. Steyn, to this Court in 1950, in support of their contention that Respondent, through Dr. Steyn, conceded that Article 7, if in force, entitled League Members to institute proceedings to uphold the rights of the inhabitants of South West Africa.

Mr. President, this matter was first raised by the Applicants at page 93 (I) of their Memorials, where the following two passages were cited from Dr. Steyn's address, and I read the passages:

> "It was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants of mandated territories or to claim rights for themselves in those territories."

And

> "Nor have individual Members of the United Nations any *locus standi* in respect of the administration of South West Africa. They could have had such a *locus standi* only as Members of the League."

We dealt with that matter at pages 391-393 (I) of the written Objections.

There we referred to various passages in Dr. Steyn's address from which it is clear that he used the expression *locus standi* in relation to Members of the League as their right of participation as Members in the League's supervisory functions and *not as locus standi* in judicial proceedings before the Court—indeed Dr. Steyn referred to the League

as having *locus standi* in respect of supervision, whereas of course, as we know, the League had no rights under the compulsory jurisdiction clause.

In the light of this consideration we contended that where, in the passages cited by the Applicants, Dr. Steyn said that it was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants of Mandated territories, and that so after he had stated that Members of the League had lost their *locus standi* when the League dissolved itself, he was referring not to judicial process but to the participation in the exercise of supervisory functions of the League itself.

When Dr. Steyn later remarked that individual Members of the United Nations could have had a *locus standi* in respect of the administration of South West Africa only as Members of the League, he was again referring *not* to judicial proceedings but to participation as Members of the League in the League's supervisory functions.

In taking this matter up *again* in their Observations, at pages 470-471 (**I**), the Applicants cite a further passage from Dr. Steyn's address, under the heading "Rights of peoples of South West Africa", where Dr. Steyn referred to Articles 11 (2) and 19 of the Covenant and immediately thereafter used the following language:

> "Moreover, any dispute between a Mandatory and another Member of the League relating to the interpretation or the application of the provisions of the Mandate could be submitted to the Permanent Court of International Justice."

Now, the Applicants' comment thereon is formulated in the following questions, at page 471 (**I**) of the Observations:

> "If Dr. Steyn did not consider that Article 7 was for the benefit of inhabitants, why did he discuss it under the heading 'Rights of Peoples of South-West Africa'? If all he meant was that League Members could participate in League proceedings to uphold the inhabitants' rights, as Respondent now contends, why did Dr. Steyn mention Article 7 at all? And why did he mention Article 7 right after mentioning Articles 11 (2) and 19 of the Covenant, which provide for participation in League proceedings, and begin the reference to Article 7 with the word, 'moreover'?"

Mr. President, the answer to all this is simple. Although the portion of Dr. Steyn's argument in question is headed "Rights of Peoples of South West Africa", he dealt in that piece not only with the rights of the inhabitants, but, by way of contrast, also with the rights of States unconnected with the interests of the inhabitants. In the very paragraph after that cited by the Applicants in their Observations, Dr. Steyn said that it was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants, or to claim rights for themselves in those territories. That Dr. Steyn mentioned Article 7 right after he mentioned Articles 11 (2) and 19 of the Covenant, and that he began the reference with the word "moreover" has no significance in view of the fact that despite the heading to that portion of his argument, he had in mind and he mentioned not only the rights of inhabitants, but also the rights of Member States. It has as much significance as the fact that under that very heading and in the very

next paragraph Dr. Steyn said that Members of the League, in their capacity as such, were competent to claim rights for themselves in Mandated territories, and that so immediately after he had said that Member States were competent to uphold the rights of inhabitants of Mandated territories.

With regard to the summary appearing at page 471 (I) of the Applicants' Observations, under the heading "Summary", we have already demonstrated that our contention does not rest on an attempt to import into Article 7 a further unstated requirement. Our contention is formulated upon a proper construction of the word "dispute" in Article 7 of the Mandate, and upon the likely intention of the authors of the Mandate system, as gathered from the terms of Article 22 of the Covenant and the Mandate instrument, having due regard also to all the probabilities.

Having dealt, in particular, with the views of each of the authorities, judicial and scholarly, relied upon by the Applicants, Mr. President, we refute the allegation by the Applicants that the two writers who support Respondent's contention, namely Wessels and Schwarzenberger, are in square disagreement with Judges Bustamante, Nyholm, McNair and Read, and all the other authors relied upon by the Applicants, as well as with Respondent's so-called "previous position", a statement which was made by the Applicants in the summary at page 471 (I).

Applicants conclude their contentions with regard to the third Objection under a heading "Applicants have a material interest in the instant cases". We find that at page 472 (I) of the Observations. They say there first:

> "Respondent devotes much attention to 'material interest' and 'legal interest' in its Preliminary Objections, but does not define or analyze those terms.
>
> 'Legal interest' does not require extensive discussion. As Applicants have demonstrated herein, they come within the descriptive category of States entitled to invoke Article 7 in accordance with its terms. Thus they have a legal interest because Article 7, to which Respondent agreed to be bound, endowed them with such an interest."

Now this line of reasoning, Mr. President, demonstrates the fallacy in Applicant's argument with regard to this Objection. Instead of having regard to the provisions of the Mandate as a whole, read in the light of Article 22 of the Covenant, in order to ascertain what rights were intended for Member States of the League with regard to the Mandate administration and then to construe Article 7 as applicable in the assertion of such rights, the Applicants, in disregard of the accepted rules of interpretation, ignore Article 22 of the Covenant and the provisions of the Mandate other than Article 7. Looking at Article 7 only, they find that it refers in terms to any dispute whatever relating to the interpretation or application of the provisions of the Mandate, and then they assume, erroneously so in our submission, that Article 7 itself was intended to confer on individual League Members legal rights in respect of each and every provision of the Mandate.

We say that this assumption is erroneous inasmuch as Article 7 does not in itself purport to confer legal rights; it merely provides for ad-

judication of disputes, and by the term "dispute" was meant, as I have demonstrated, a conflict or disagreement in matters in which a Member State has a legal right. The matters in which they were meant to have legal rights cannot be gathered from Article 7, but must be gathered from the whole of the Mandate instrument and Article 22 of the Covenant.

With regard to the term "material interest", it is true, as the Applicants say, that we have not furnished a definition thereof. In the first place we consider it unnecessary to do so—there is as little need for defining that term as there is for defining the expression "material well-being" which appears in the Mandate instrument, an expression with which Applicants apparently have no difficulty as to its meaning. We use the expression "material interest" not to denote a substantial interest but in the same sense as the word "material" was intended to qualify the word "well-being" in the Mandate instrument, namely, as pertaining to matter, for instance safety, health, wealth and the like. It would be well-nigh impossible to formulate a definition to embrace each and every matter which in the course of Mandate administration could have affected Member States of the League of Nations or their nationals. Whether a Member State could validly contend that it was affected either directly or through its subjects by a particular act of a Mandatory must be a matter for decision in each case. I have already, in the course of my argument, given examples of material interests of States that could be affected by acts of a Mandatory.

It is sufficient to say that in the present cases the Applicants do not and indeed cannot make the point that they as States are affected directly or through their nationals by any act of the Mandatory. At most their case is that they are concerned about the welfare of the inhabitants of non-independent territories and that they regard that concern as of great importance. Indeed, that is a statement made by them at page 472 (I) of their Observations, where we find this:

> "Contrary to Respondent's position, most States, in the increasingly inter-related community of nations, today regard the problems of less developed areas as a matter of great importance to their own welfare."

Now, of course, States in the contemporary world are, in the broad sense, interested in, or should one say concerned about, the welfare of peoples not yet able to stand by themselves. The establishment of the Mandates system under the League and of the Trusteeship system under the United Nations bear evidence of such concern. But the mere fact of being so concerned does not determine the role intended for individual States within either of the two systems. The fact that members of an organization are entitled to participate in the decisions of that organization surely does not confer legal rights on the individual members in the subject-matter of such decisions.

The functions of individual States in the Mandates system, and their legal rights *vis-à-vis* the Mandatories, can only be determined by reference to the instruments by which that system came into force—into existence

—namely the Covenant and the Mandate instruments. The same holds good for the present day Trusteeship system where regard must be had to the Charter of the United Nations and the Trusteeship agreements.

To say that States in the contemporary world have considered their interests to be involved in the welfare of the inhabitants, first of the Mandated territories, and later of Trusteeship territories, does not provide an answer to the question before the Court. No matter how much they may have considered their interests involved in the welfare of such peoples, that in itself, surely, could not confer on them any rights as against Mandatories under the League, or as against administering authorities of trust territories, under the United Nations.

No doubt during the lifetime of the League some States, not being Members of the League, were also concerned, like League Members, about the welfare of inhabitants of Mandated territories, but could they for that matter claim any rights as against the Mandatories? Surely the answer is no. And the same question can be put with regard to States who are not Members of the United Nations today, but may be as concerned as the Applicants are about the welfare of peoples of trust territories.

Furthermore, Applicants are no doubt as much concerned about the welfare of the peoples of the trust territories in Nauru, New Guinea, and the former Japanese Mandated islands as they are concerned about the welfare of peoples in other trust territories. But are their rights and recognized interests identical in respect of all such territories? A study of the respective trusteeship agreements shows clearly that the answer is in the negative. Although most of the trusteeship agreements make provision for compulsory jurisdiction, the agreements for the trust territories of Nauru, New Guinea and the former Japanese Mandated islands do not. Why is that so? It is so by reason of the relevant treaties and conventions which prescribed the rights of States with regard to Mandated territories and later with regard to trust territories.

There is, Mr. President, no attempt on our part to define, as Applicants suggest in their Observations, the permissible scope of interests of other States. We have, as we conceive it our duty and function before the Court, endeavoured to demonstrate by proper construction of the relevant instruments, what rights and interests were intended for Members of the League with regard to the administration of Mandated territories and which of such rights and interests were intended to be assertable by judicial proceedings.

The Applicants, on the other hand, attempt to establish that they have certain rights, not by reference to the instruments in which such rights, if they did exist, would have been recorded, but by advancing their own views as to the importance to them, in the increasingly interrelated community of nations, of the problems of less developed areas, and of their concern about the welfare of the peoples of such areas. There is no justification for the line of reasoning adopted by the Applicants.

However important Applicants may regard their concern for the welfare of the peoples of South West Africa, that surely, in itself, can not confer on Applicants the rights or vest in them a material interest, in the sense under discussion, which they in fact do not possess. The question is not whether Applicants *consider* their material interests to be involved, but whether their material interests *are*, in fact, involved.

Nor can their participation with other States in debates in the United Nations concerning South West Africa, however often that may have occured, endow them with rights not contemplated by the Covenant and the Mandate.

Mr. President, I repeat our contention that the material interests of the Applicants are not affected by the matters complained of by them in the present proceedings, and that being so, the Applicants, in our submission, have no legal rights or interests in the matters now before the Court and there is consequently no dispute, as envisaged in Article 7 of the Mandate, for adjudication by the Court.

But even if it could be said that Applicants have a legal right or interest in such matters then, in our submission, it was not intended that Article 7 could be invoked in the assertion of such rights or interests and therefore there is no dispute as envisaged in that Article.

Mr. President, that is the end of my argument on the third Objection.

Mr. President, may it please the Court, I intend proceeding now with argument on our Fourth Objection.

For the purposes of this Objection, two assumptions are made. The first assumption is that despite the dissolution of the League the Applicants, as former Members of the League, have retained the rights conferred on them by Article 7 of the Mandate—in other words that they may still invoke the Article, but, of course, provided the requirements of the Article are satisfied.

The second assumption is that the subject-matter of the alleged conflict or disagreement in the instant cases concerns the interpretation and/or the application of the provisions of the Mandate.

But then, in order to invoke Article 7, it still remains for the Applicants to satisfy this Court that there exists as between them and Respondent a dispute, and that that dispute cannot be settled by negotiation.

Before dealing with the Applicants' allegations in this connection, it is necessary to consider two questions that arise with regard to the essential requirements for jurisdiction under Article 7.

The first question is, when does a conflict or disagreement become justiciable as a dispute; and the second question is, under what circumstances can it be said that an existing dispute cannot be settled by negotiation?

Both these questions came up for consideration in the *Mavrommatis* case, where the Court was concerned with Article 26 of the Mandate for Palestine, the provisions of which Article were identical to those of Article 7 of the Mandate for South West Africa. At pages 396-399 **(I)** of our written Objections, we quoted at length from the Judgment and dissenting Opinions in the *Mavrommatis* case, to demonstrate that from the views expressed by the majority of the Court and certain of the Judges in the minority, two propositions would appear to be clear. I am not going to read the extracts again as they appear in our written Objections, I will just refer to the conclusion which we drew at page 399 **(I)**, the conclusion being that:

"Before a dispute can be justiciable:

(a) its subject-matter must have been clearly defined; and

(b) the Mandatory must have been afforded an opportunity to negotiate with the object of settling the dispute. And, except in the rare type of case where from the very circumstances or

> the nature of the dispute it is clear that the dispute cannot in fact be settled by negotiation, either the Mandatory must have failed to avail itself of an afforded opportunity to negotiate, or, the Mandatory having so availed itself, the negotiations must have resulted in a deadlock, before it can be said that the dispute is one which cannot be settled by negotiation."

The Applicants, at page 450 **(I)** of their Observations, cite the Judgment in the *Mavrommatis* case for a definition of the word "dispute" in the context of the compulsory jurisdiction clause, that definition being as follows, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". Again, at pages 463-465 **(I)** of the Observations, there appears an analysis of the issues and findings in the *Mavrommatis* case. But nowhere in their Observations do the Applicants refute the conclusion which we drew at pages 398 and 399 **(I)** of our written Objections from the *Mavrommatis* case and the other decisions there referred to, i.e., the propositions which I have cited in the extract just read from our Observations, to the effect that before a dispute can be justiciable in terms of the compulsory jurisdiction clause, its subject-matter must have been clearly defined, and the Mandatory must have been afforded an opportunity to negotiate in the sense which I have stated—unless it can be established that the dispute, from its very nature, or by reason of the particular circumstances, is one which cannot possibly be settled by negotiation. We must therefore conclude that the Applicants concede the correctness of these general propositions.

Proceeding now to the subject-matter of the dispute alleged to exist in the instant cases, we find that Applicants formulate that dispute, and I quote, as "a disagreement on points of law and fact as well as a conflict of legal views and interests", and it is particularised by the Applicants as follows, at page 89 **(I)** of their Memorials where the Applicants say:

> "The record of the present case makes clear that, for more than ten years, the Applicant herein has had a disagreement on points of law and fact, as well as a conflict of legal views and interests, *with the Union. The Applicant has maintained* at all times that the Mandate is in force; the Union, that the Mandate has lapsed. The Applicant has insisted that the Union has violated the Mandate; the Union has denied doing so. The Applicant has contended that the United Nations has supervisory powers over the Union as Mandatory; the Union has repeatedly rejected its contention. The Applicant has asserted a legal interest in, and the right to object to, the manner in which the Union administers the Territory; the Union insists that it alone has a legal interest in what occurs in the Territory."

The matters so alleged to be in conflict fall into two separate categories by their very nature. The first category comprises disagreements purely on points of law, namely whether the Mandate is still in force, whether the United Nations has supervisory powers in respect of South West Africa, and whether the Applicants have a legal right or interest in the administration of that territory. The second category comprises alleged disgreements which are not concerned only with points of law but also involve a conflict on facts, namely whether Respondent has violated the Mandate.

For convenience and clarity as to our contentions with regard to this Objection, these two categories will be dealt with separately, commencing with the category comprising points of law only.

In the first place it is clear from our written Objections, and I refer here again to page 399 (I), that we do not deny the existence of a dispute concerning the aforesaid points of law, that is of course, Mr. President, assuming in the Applicants' favour on the third Objection. The Applicants, in participating in debates in, and resolutions of, the organs and agencies of the United Nations, have contended that the Mandate is in force, they have contended that the United Nations has supervisory powers over Respondent as a Mandatory, and that they, the Applicants, have a legal right and interest in the administration of South West Africa. The Respondent, on the other hand, has in the debates in the organs and agencies of the United Nations and in correspondence with the United Nations, rejected these contentions of the Applicants. The subject-matter of the disagreement concerning these points of law can therefore be said to be defined with sufficient clarity to constitute a justiciable dispute. We, however, deny the allegation that the dispute concerning these points of law cannot be settled by negotiation.

Applicants do not suggest that the dispute concerning points of law is one which, by its very nature, or by reason of special circumstances, cannot possibly be settled by negotiation. On the contrary, they base their case with regard thereto on alleged frustration of efforts at negotiation on the part of organs of the United Nations and agencies of the United Nations appointed for the very purpose of negotiating with Respondent, these organs and agencies being the Fourth Committee of the General Assembly, the *Ad hoc* Committee, the Good Offices Committee, and the Committee on South West Africa. The Applicants' statements relative to these negotiations are to be found in their Memorials at page 93 **(I)**, and also in their Observations at page 473 **(I)**.

Now we do not deny that there were these efforts at so-called negotiation, but we make the case that Respondent has never been afforded any real opportunity of negotiating with the object of settling the dispute. With regard to that contention, we draw attention in the first place to the restrictive nature of the terms of reference of the various committees appointed as agencies of the United Nations to negotiate with Respondent. Thus we point out that the *Ad hoc* Committee established in 1950 was to confer with Respondent on, and I quote from page 273 **(I)** of the Preliminary Objections, the "procedural measures for implementation of the Advisory Opinion of the Court". These terms of reference were modified in 1952 to conferring with Respondent "concerning means of implementing the Advisory Opinion".

In 1953 the Committee on South West Africa was appointed to continue negotiations with Respondent, and I quote from page 280 **(I)** of the Preliminary Objections, "in order to implement fully the Advisory Opinion."

The terms of reference of the Good Offices Committee established in 1957 were originally less restrictive, and they were, as we find at page 286 **(I)** of the Preliminary Objections, to discuss with Respondent "a basis for an agreement which would continue to accord to the Territory of South West Africa an international status."

These wider terms of reference of the Good Offices Committee resulted in at least one proposal, suggested by that Committee and accept-

able to Respondent, being formulated for consideration by the General Assembly. That proposal was that Respondent should carry out an investigation of the practicability of partitioning South West Africa, but this proposal was rejected by the General Assembly. At the same time the General Assembly altered the terms of reference of the Good Offices Committee to find a basis for an agreement which would "continue to accord to South West Africa as a whole an international status and which would be in conformity with the purposes of the United Nations", and added to that, "bearing in mind the discussions at the Thirteenth Session of the General Assembly". The terms of reference which I have just read are to be found at page 289 **(I)** of the Preliminary Objections.

Now, with its terms of reference so circumscribed, the Good Offices Committee had eventually to report that it, and I quote from page 291 **(I)** of the Preliminary Objections, "has not succeeded in finding a basis for an agreement *under its terms of reference*". We say that by limiting the power of these agencies in the manner aforestated, the compass of their respective fields of negotiation was restricted and correspondingly the opportunity for negotiation afforded to Respondent was also limited to that extent.

This was a matter of particular importance inasmuch as Respondent felt strongly that the problem of international supervision of its administration of South West Africa required special consideration, with a view to avoiding more onerous obligations for Respondent than those which pertained during the lifetime of the League. And this, Mr. President, was the very point on which the negotiating agencies were left inadequate freedom, their terms of reference directing at insistence on United Nations supervision.

Mr. President, in negotiations through ordinary diplomatic channels parties are unfettered in their exploration of all avenues which may present a solution to their differences. Where, however, as in the present case, negotiations are in advance restricted to a narrow field, the possibility of settlement is substantially reduced, if not excluded altogether.

Respondent's repeated objections in the United Nations to stultification of negotiations in the manner which I have stated was not heeded.

Another objection voiced by Respondent at the time, as we have set out at pages 279 and 280 **(I)** of the Preliminary Objections, was that while the *Ad Hoc* Committee insisted that Respondent should in principle accept United Nations supervision as a basis for negotiation, the Committee declined, despite Respondent's requests, to show how machinery for United Nations supervision could be devised without subjecting Respondent to obligations more onerous than those assumed under the Mandate. Nor did the General Assembly suggest a solution to this difficulty.

It will be recalled that this Court in its 1950 Advisory Opinion stated as follows:

> "The degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." (*1950 Opinion*, p. 138.)

In this regard Respondent repeatedly drew attention to two very important difficulties. The first was the Constitution of the Permanent Mandates Commission under the League as compared with the organs of the United Nations and with the Committee on South West Africa which was appointed in 1953 with the function, *inter alia*, of exercising supervision over the administration of South West Africa. The Permanent Mandates Commission was a commission of experts, independent of their governments. There is no corresponding body or organ in the United Nations. The Committee on South West Africa was composed of political representatives of Member States, the selection of individuals being left to the discretion of the States elected to serve on the Committee. This applies also to all other councils, committees and agencies of the United Nations. Thus, unlike the members of the Permanent Mandates Commission, the members of the Committee on South West Africa, in exercising their supervisory functions, did not stand apart from the political views of their governments.

In the second place, the ultimate supervisory body in the League was the Council, a body of limited membership and the voting procedure whereof was subject to the unanimity rule. The corresponding organ in the United Nations contemplated to exercise ultimate supervisory functions in respect of South West Africa was the General Assembly, an organ with much broader membership than the Council of the League, and in the voting procedure of which the unanimity rule does not apply. Article 18 of the Charter provides only for decisions by a majority or, in the case of certain matters, by a two-thirds majority.

If Respondent had acquiesced in the supervision of its administration by the Committee on South West Africa and the General Assembly of the United Nations, its task would definitely have been more onerous than it was under the League of Nations. In effect, therefore, the insistence upon prior acceptance by Respondent, in principle, of United Nations supervision meant the insistence upon acceptance by Respondent of more onerous obligations as a prerequisite for negotiations.

Another frustrating feature of these so-called efforts at negotiation was the conferment on the agencies appointed to negotiate with Respondent of powers, the exercise of which was in direct conflict with their office of negotiation. Thus, in addition to its powers of negotiation, the *Ad Hoc* Committee was to examine reports and petitions with regard to South West Africa and report thereon to the General Assembly. We draw attention to that aspect at pages 273 and 276 **(I)** of the Preliminary Objections. Likewise, in the case of the Committee on South West Africa, it was appointed to negotiate with Respondent and also to exercise supervision over South West Africa. Later its functions were even extended to embrace also the study of legal action against Respondent. These are matters to which we drew attention at page 280 **(I)** of the Preliminary Objections.

By the purported conferment of such powers of supervision and the exercise thereof, against which Respondent had repeatedly protested, there was created this peculiar position that while Respondent was invited to negotiate a settlement of a dispute, the very nature of which involved a manifest denial by Respondent of United Nations supervisory powers, these agencies were, at the same time, exercising supervisory powers and attempting to subject Respondent thereto as if the dispute

with regard to supervision had already been settled against Respondent's contention.

Moreover, the organ to which these agencies reported on the results and developments of efforts at negotiation, i.e. the Fourth Committee of the General Assembly, was also the organ to which these agencies *accounted with regard to their supervisory functions. And this state* of affairs was not conducive to fruitful results in negotiation, inasmuch as the debates in the Fourth Committee were invariably marred by disturbing features, such as, for instance, the oral hearing of petitioners. How could Respondent be expected to negotiate under such circumstances; circumstances which tended to frustrate the very object of negotiations, the very object, as we see it, being the settlement of a dispute?

The prospects of successful negotiations were further limited by the repeated requests of the General Assembly that Respondent should submit South West Africa to United Nations Trusteeship, and that so despite the Court's 1950 Opinion that Respondent was not obliged to conclude a Trusteeship agreement. The General Assembly passed annual resolutions urging the Respondent to do so. We give a summary of those resolutions at page 402 **(I)** of the Preliminary Objections. These resolutions clearly suggested that the majority of Members of the United Nations would not be satisfied with any settlement of the dispute which would not result in South West Africa being brought within the Trusteeship System. In fact, Mr. President, the last General Assembly resolution offering negotiations before the present cases were brought to Court, that is a resolution of 17 November 1959, invited Respondent—and I quote—to:

> "... enter into negotiations with the United Nations through the Committee on South West Africa, which is authorized under its terms of reference to continue negotiations with the Union, or through any other committee which the General Assembly may appoint, with a view to placing the Mandated Territory under the International Trusteeship System". (*General Assembly Resolution* 1360 (XIV), 17 November 1959.)

This is a clear indication of what the majority of Members would be satisfied with.

Of particular significance is the role played by the Applicants in this connection. Not only did they sponsor and/or support the resolutions of the General Assembly calling for a Trusteeship agreement, but they made it quite clear that they would not be satisfied with anything but a Trusteeship agreement for South West Africa. Thus, for example, at the Second Conference of Independent African States held at Addis Ababa in June of 1960, the Liberian Representative, Mr. Rudolph Grimes, said—and we find what I am going to quote now recorded at page 82 **(I)** of the Applicants' Memorials; this is what he said: that his Government had

> "... already indicated its determination on behalf of all the African States, to pursue further action to get this territory [South West Africa] placed under the Trusteeship Provisions of the Charter".

In this regard, I also wish to refer to a statement of the Ethiopian Representative, Mr. Gebre-Egzy, speaking as a member of the Committee on South West Africa in the Fourth Committee on the 19 October 1959. He dealt with the General Assembly resolution No. 1143 (XII) of the 25 October 1957. This resolution appointed the Good Offices Committee—and I quote—to:

".. discuss with the Government of the Union of South Africa a basis for an agreement which would continue to accord to the Territory of South West Africa an international status".

Clearly, the resolution merely refers to *a* status but does not prescribe a particular status: and this is what the Ethiopian Representative had to say with regard to this resolution:

"... when the Committee was discussing the wording of the text which was later adopted as General Assembly resolution 1143 (XII) several delegations—among them, Ethiopia—had made clear that the words international status meant trusteeship status. The General Assembly had been entirely right to oppose, at its 13th session both the Territory's partition and any solution which offered less than the full trusteeship régime as it was applied in all the other territories administered by Member States of the United Nations."

And further:

"Mr. Louw had, on behalf of his Government [the Union of South Africa], renewed the offer to enter into an agreement which would accord some international status to the territory; in that connexion, the Ethiopian delegation was obliged to state that the only legally acceptable status for the Territory would be trusteeship status. Nothing less would be in accordance with the Charter and the Advisory Opinion of the International Court of Justice." (*U.N. Doc.* A/C. 4/SR 914, p. 164.)

Now this statement is significant not only in so far as it indicates clearly the position taken by Ethiopia, but also in that it attempts to justify that position by reference to the Advisory Opinion of the Court, whereas the Court had held that Respondent was not obliged to submit the territory to United Nations Trusteeship.

Mr. President, in the premises can it ever be said that Respondent was afforded a real opportunity to negotiate with the object of settling the dispute, when members of the negotiating agency, such as Ethiopia, serving on the Committee on South West Africa, viewed their task as one to insist on the extreme of a Trusteeship agreement, and when it was clear from the attitude of the majority of Members of the General Assembly that a Trusteeship agreement would be the only arrangement acceptable to them? Mr. President, we submit that it can never be said that a reasonable opportunity for negotiation was afforded.

[Public hearing of 11 October 1962, afternoon]

Mr. President, I am still dealing with the conflict between Respondent and the United Nations regarding the status of South West Africa. We say that Respondent's willingness and desire to find a solution to the disagreement which would be acceptable to all parties concerned is amply demonstrated by the record of events over the years 1946 to 1960 as dealt with in Chapter II, Part B, of our written Objections, that is from pages 256-297 **(I)**. Now, it will not be possible in argument to traverse the whole field of history. I will however mention those matters which are important for the purpose of my argument, and will, as I proceed, mention for the purpose of the record the pages in the Preliminary Objections where such matters are dealt with.

Now, although Respondent had throughout maintained its juridical position it nevertheless put forward concrete proposals involving important concessions with a view to finding a solution.

It had in 1951 declared its preparedness to negotiate a new international instrument embodying the substantive obligations of the Mandate, and, if considered necessary, also an obligation to submit to the jurisdiction of this Court. When these proposals did not satisfy the *ad hoc* Committee, because the Committee felt that the United Nations was not given a sufficient role, Respondent went further and declared that it was prepared to accept a compromise whereby the idea of a fresh agreement be sanctioned by the United Nations prior to the negotiation of such an agreement. This matter is dealt with in the Preliminary Objections, pages 274-275 **(I)**.

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

All these proposals involved concessions on the Respondent's part, but the Committee found these proposals unacceptable because, as it indicated:

> "it did not allow for a full implementation of the advisory opinion" (*of the Court*),

those were the words of the Committee, and also that they

> "could not therefore be considered as within [the Committee's] terms of reference".

In this respect, I refer to the Preliminary Objections, page 275 **(I)**, where the reaction of the Committee is dealt with.

When these proposals were resubmitted to the Committee in 1952, the Respondent, upon enquiry from the Committee, undertook that under the proposed agreement the Respondent would supply annually, to the Powers with whom the agreement was to be concluded, information on South West Africa as complete as that furnished to the League of Nations.

Still the Committee was not satisfied as it insisted on United Nations supervision and considered that the proposed agreement should be concluded with the United Nations or with an agency of the United Nations. That matter is dealt with at pages 277-278 **(I)** of our Preliminary Objections.

With the hope that an acceptable solution could still be found, Respondent discussed various possibilities with the Good Offices Commit-

tee in 1958 when the Committee suggested that a partitioning of South West Africa (and I quote their own words) "might provide the basis for the solution". Respondent intimated that it would be prepared to investigate the practicability of partitioning and, if found feasible, Respondent would submit proposals to the United Nations.

The suggestion of the Good Offices Committee that such an investigation be made was, however, as we indicate in the Preliminary Objections at pages 348-349 **(I)**, rejected by the General Assembly.

Respondent nevertheless reiterated its preparedness to negotiate further and stated its position in clear language to the Fourth Committee on the 26 October 1959. In this respect, I refer to page 351 **(I)** of the Preliminary Objections, where towards the middle of the page one has the reply of the Respondent in the following terms:

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

This offer was repeated in a letter to the United Nations on 29 July 1960, but elicited no reaction. The letter is dealt with at pages 353-354 **(I)** of the Preliminary Objections.

On 4 November 1960, these proceedings were instituted by the Applicants and the Respondent has since followed a course of conduct strictly in observance of the *sub judice* rule, despite the fact that the matters in issue in these proceedings have since formed the subject of debate in the United Nations.

Although Respondent, in its written Objections at pages 401-405 **(I)**, clearly stated its reasons for contending that it had not been afforded a real opportunity of negotiating, as is contemplated in Article 7 of the Mandate, with regard to the legal points in issue, the Applicants in their Observations do not deal with that contention at all. They do not refute Respondent's conclusion that negotiations were frustrated by the following circumstances:

(i) the restrictive terms of reference of the agencies appointed to negotiate with Respondent;

(ii) the purported conferment on, and the exercise of supervisory powers by, the very agencies appointed to negotiate, and the resultant creation of an atmosphere not conducive to negotiation;

(iii) the requirement of prior acceptance by the Respondent of United Nations supervision as a basis for negotiation;

(iv) the persistent urging that Respondent submit South West Africa to United Nations Trusteeship, and the expression of views by the majority of States in the United Nations, which suggested that they would not be satisfied with any other arrangement than a trusteeship agreement.

Now, the Applicants, at page 473 **(I)** of their Observations, merely refer again to what they term frustrated efforts at negotiation over a period of more than 10 years, and to the conclusion by the General Assembly in its resolution of 1960, which they quote:

> "the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate has not and cannot be settled by negotiation".

And, say the Applicants, this is a finding of fact by the highest administrative organ of the United Nations, embodying a conclusion amply warranted by an exceptionally full record.

Elsewhere in the Observations we find the Applicants stating as follows (at page 455 **(I)**, second half of the page):

> "Further, the dispute concerns the United Nations itself as an institution, inasmuch as Respondent disputes that the Organization is vested with supervisory powers over the Mandate",

and, on the next page, 456 **(I)**, the top half of the page:

> "In instituting these proceedings, Applicants have moved to protect not only their own legal interests but the legal interests of the United Nations (which itself, may not be a party to contentious proceedings), as well as the legal interests of every other Member State similarly situated."

We do not deny that the United Nations is, by reason of its claim to powers of supervision over the Mandate, concerned in the dispute; indeed, if it had not been for the claims put forward by the United Nations it is unlikely that there would have been any dispute at all and therefore any legal proceedings.

The conclusion embodied in the resolution of the General Assembly must therefore be seen in its correct perspective and appraised as such. Although described by the Applicants as "the highest administrative organ of the United Nations", the General Assembly is in fact also a political body. The resolution of the General Assembly is no more than the expression of a collective opinion by the States who voted for the resolution, such States being, as the resolution shows, involved in the dispute as Members of an organization which is itself directly concerned in the dispute. It is not an objective appraisal of the situation by a body not a participant in the dispute.

The Applicants go on to say, at page 473 **(I)** of the Observations, that Respondent professes the view that the dispute can be settled by negotiation. Now, this is a distortion of Respondent's contention, which is formulated in clear and plain language at page 403 **(I)** of the written Objections. Referring there to the unsatisfactory features of, and the circumstances surrounding, the past efforts of negotiation, all of which had been fully set out in the written Objections, we submitted that in the premises Respondent had not been afforded a real and genuine opportunity to negotiate with an object of settling the dispute. And, for that reason, we denied that the alleged dispute concerning disagreement on points of law is one which can *not* be settled by negotiation, or that any conclusion to that effect could be drawn from the narrative of events contained in the Applicants' Memorials, as qualified and amplified in Respondent's written Objections.

Respondent's case is simply this, that until it has been afforded a real and genuine opportunity to negotiate it can *not* be said that the dispute is one which cannot be settled by negotiation. Respondent's willingness to negotiate with an appropriate United Nations body, with a view to

exploring all possibilities, still stands, but has never met with any reaction from the United Nations. Given such an opportunity, we say that the dispute need *not* be incapable of solution by negotiation.

The Applicants say further, at page 473 (I) of their Observations, round about the middle of the page, that Respondent:

> "... omits to state ... the unspoken qualification shown by the lengthy record: [namely] negotiation can succeed only upon acceptance of Respondent's conditions and interpretations".

But, Mr. President, we submit that the very record to which the Applicants refer puts the boot on the other foot. Respondent has never attempted to circumscribe the compass of negotiations with conditions. It has to the very last reiterated its readiness to enter into negotiations which would allow for the fullest discussion and exploration of all possibilities.

It was the Applicants and other Members of the United Nations who by majority vote in that Organization imposed conditions, in the nature of restrictive terms of reference, on the agencies appointed to negotiate with Respondent and thereby limited the compass of negotiations proffered to Respondent.

Nor did Respondent limit its proposals to fall within the juridical position as interpreted by it. Despite Respondent's contention that since the dissolution of the League of Nations it alone had a legal interest in the administration of South West Africa, Respondent proposed without prejudice to its legal position to negotiate a new international instrument embodying the substantive obligations of the Mandate and also, if considered necessary, an obligation to submit to jurisdiction of this Court. It even proposed that the idea of a new agreement be first sanctioned by the United Nations, and that the agreement should, after conclusion, be confirmed by the United Nations. Later Respondent also declared its preparedness to investigate the practicability of partitioning South West Africa as suggested by the Good Offices Committee.

It was the Applicants and other Members of the United Nations who were adamant that no concessions should be made on their part—nay even more, who were adamant that Respondent should submit to something which they knew Respondent was not legally obliged to—and that is to submit South West Africa to United Nations trusteeship.

At pages 473-474 (I) of their Observations, the Applicants cite, in support of their contention that Respondent has frequently avowed the failure of negotiations, extracts from three letters written by Respondent. Most certainly Respondent avowed the failure of such negotiations as there were, but at the same time Respondent made it clear why Respondent thought the negotiations did not, and could not be expected to, lead to any positive results. The three letters quoted from by the Applicants were written in the years 1954, 1955 and 1956 in response to invitations by the Committee on South West Africa that the Respondent should negotiate with it. In the first letter Respondent made it clear that in view of the restrictive terms of reference of the Committee it was doubtful whether negotiations would lead to any positive results. This prediction proved to be correct. And in the subsequent two letters Respondent reiterated that while the Committee's terms of reference stood unaltered, there was no hope that negotiations could lead to positive results.

In concluding their contentions with regard to this Objection, at page 474 (I) of their Observations the Applicants say, and I quote from page 474 of the Observations:

> "As the General Assembly has repeatedly found in Resolutions ... by overwhelming majorities, Respondent has refused, and continues to refuse, to act on the basis of its international responsibilities under the Mandate, in the teeth of the Advisory Opinion of this Court. This remains the center and core of the dispute between Applicants and Respondent. The very contentions advanced by Respondent in its *Preliminary Objections* clearly demonstrate that its continuous, historic position persists. By its own contentions it proves, if proof is needed, that the dispute cannot be settled by negotiation."

Mr. President, instead of attempting to answer our contention that Respondent has not been afforded a real opportunity of negotiating a settlement of the dispute, Applicants rely on the resolutions adopted by the majority vote in the General Assembly of the United Nations. As I have already stated, these resolutions must be considered in their proper perspective. They are no more than the expression of a collective opinion of the majority of States in the United Nations, which States, in Applicants' own submission, are parties to the existing dispute. Their finding, by voting for resolutions in the General Assembly, that Respondent has refused and continues to refuse to act on the basis of its international responsibilities under the Mandate rests, of course, on their own conceptions of what these responsibilities are. We have contended, and have fully argued our contention, that the views of these States as to Respondent's international responsibilities are legally unsound. If our submrission as to the juridical position is correct, as it is contended to be, then it would follow that the criticisms contained in the resolutions to which the Applicants refer are equally without foundation. Admittedly Respondent has not accepted in full the Court's Advisory Opinion of 1950, but it has refused to do so on grounds which, we respectfully submit, are sound in law.

Whatever the centre and core of the dispute between the Parties may be, Respondent has demonstrated its desire and willingness to find a solution to the dispute, but the Respondent contends, for the reasons advanced in argument, that it has not been afforded a real opportunity of negotiation, and that the record of events in the United Nations does not justify a conclusion that the dispute cannot be settled by negotiation.

I deal next, Mr. President, with the alleged conflict or disagreement which is not concerned purely with questions of law, that is the alleged violation by Respondent of the substantive provisions of the Mandate. In this respect, the Applicants say, at page 91 (I) of their Memorials, towards the bottom of the page:

> "The Applicant alleges, and the Union has denied, that the Union has violated and is violating Articles 2, 4, 6 and 7 of the Mandate. There is therefore a dispute concerning both the interpretation and the application of these Articles of the Mandate."

In support of their contention the Applicants refer to their participation with other Members of the United Nations in debates and resolutions in that Organization concerning the administration of South West Africa. Now, in these debates and resolutions, certain aspects of administration in South West Africa have been criticized. Participation in these debates, and in the resolutions of the organs and agencies of the United Nations, was not confined to States which, as Members of the League of Nations, had, prior to the dissolution of the League, a legal interest in the administration of South West Africa. States which had never been Members of the League, and at no time had a legal interest, took an active part in discussions in the United Nations on South West Africa and in sponsoring and voting on resolutions concerning the administration of that territory.

From the inception of the United Nations Respondent had made clear its juridical position with regard to South West Africa, namely, that it was not obliged to submit a trusteeship agreement for the territory, and that in the absence of such an agreement the United Nations had no supervisory authority in respect of the territory. This attitude Respondent maintained throughout, and refused to submit reports on the basis of accountability to the United Nations. Respondent had undertaken in 1946, as a purely voluntary act, to submit reports for information purposes only, but this undertaking was withdrawn when the conditions under which it had been given were not observed by the United Nations in dealing with the report for the year 1946.

There was not the same consistency in attitude on the side of other Members of the United Nations with regard to South West Africa. During the year 1947 a great number of States participated in debates on South West Africa in the organs of the United Nations. Particulars of such debates were furnished by my learned friend, Mr. de Villiers, in addressing the Court on the First and Second Objections. We find there that, although some States considered that Respondent was obliged to conclude a trusteeship agreement for the territory, and some expressed the view that South West Africa was a non-self-governing territory, in respect whereof information was in terms of Chapter XI of the Charter to be submitted to the United Nations, not one State denied Respondent's contention that in the absence of a trusteeship agreement and unless Respondent consented to some other arrangement whereby the United Nations would be endowed with supervisory powers over South West Africa, the United Nations did not have any rights of supervision over the administration of that territory. In fact, quite a number of States expressed views clearly implying consensus with Respondent's contention.

During the years 1948 and 1949 a few States did take up the attitude that, even without a trusteeship agreement, the United Nations was entitled to exercise supervisory powers with regard to South West Africa. The reasons advanced by these States for their point of view was either that the provisions of Article 80 of the Charter had the effect of endowing the United Nations with supervisory authority—in that instance we refer to the attitudes adopted by Belgium and India—or that the United Nations as representative of the international community had replaced the League, which in its day had represented that community—we refer in that respect to Brazil, Cuba and Uruguay.

But the attitude then adopted by some of these States was in conflict with views expressed by them in the year 1947.

However, it was only after the Court's Advisory Opinion had been issued in 1950, and adopted by a majority vote in the United Nations, that there was uniformity in the conduct of a majority of Members in the United Nations who sponsored and, by majority vote, passed resolutions demanding observance by Respondent of United Nations supervision over South West Africa, and creating machinery for the exercise of supervisory powers. As mentioned by us at page 272 **(I)** of the Preliminary Objections, Respondent explained at the time, particularly with reference to the Chinese proposal at the last Session of the League, why it could not accept the Court's opinion in so far as it held that the United Nations was vested with supervisory powers over the administration of South West Africa, and Respondent maintained its attitude of non-accountability to the United Nations.

In conformity with that attitude, Respondent throughout refused to deal in the United Nations with complaints regarding, and criticism of, its administration of the territory. Respondent did on occasions participate in debates concerning the administration of South West Africa. But this was done without prejudice to its legal position, and merely for the stated purpose of demonstrating that the complaints and criticisms were based on unreliable information, and without a proper conception of conditions prevailing in the territory.

By reason of Respondent's attitude of non-accountability to the United Nations, it has not stated its case in opposition to the allegations concerning the administration of South West Africa, nor have there been any negotiations whatsoever concerning the complaints involved in such allegations. Now, if Respondent was right in its attitude of non-accountability to the United Nations—and we contend that for the reasons stated and fully argued, relevant to the First Objection, that it was right in that attitude—then it follows in our submission that Respondent was also correct and justified in its conduct of refusing to deal in the United Nations with allegations or complaints concerning the administration of South West Africa or to enter into negotiations thereanent on the basis of accountability to the United Nations.

In the premises we contend that whatever differences may, from debates in the United Nations, appear to exist as to certain aspects of administration of South West Africa, these differences are not defined to such a degree as to constitute a dispute in terms of Article 7 of the Mandate, and that, in any event, there have in fact been no negotiations regarding such differences, so that even if it can be said that there is a dispute in existence, it cannot be said that that dispute is one which cannot be settled by negotiation.

I proceed now to deal with the Applicant's Observations in reply to our contentions on this part of the Fourth Objection. Before attempting to deal with our argument on this part, Applicants in their written Observations, at pages 451 and 452 **(I)**, create confusion for themselves as to what our argument in fact is, by speculating on the exclusion of contentions not embraced in the argument.

After much unnecessary speculation, the Applicants say, at page 452:

> "Possibly Respondent seeks to imply that there is no dispute because it has not joined issue with every one of Applicants' con-

tentions, although, as it admits, Respondent has denied the general allegations. If indeed this is Respondent's position, it is erroneously conceived."

In the first place, there is no need to seek any implication in our argument. Our contention was clearly formulated at page 304 (I) of the written Objections. I will not read what is stated there, but I will briefly repeat our contention, namely that by reason of Respondent's attitude as to non-accountability to the United Nations it has not dealt with the contentions put forward in the United Nations by the Applicants and other Member States. Respondent's attitude in this respect was justified and necessary so as to prevent submission to United Nations supervision. In the result, no dispute has been generated from the allegations and contentions raised in the United Nations concerning the administration of South West Africa; and the raising of such matters in the United Nations did not, in view of Respondent's juridical position, afford a reasonable opportunity for negotiation. Though Respondent has generally denied that it has violated the provisions of the Mandate, it has refused to join issue with the particular allegations and contentions advanced in the United Nations regarding its administration of South West Africa.

But, say the Applicants, also at page 452 (I) of their Observations:

"... it is sufficient, by way of illustration, that Applicants allege that *apartheid* violates Article 2 of the Mandate, and that Respondent categorically denies the allegation. It is not a necessary characteristic of a 'dispute' that antagonists engage each other in direct debate on each and every factual point constituting their differences."

Now in whatsoever manner a dispute is manifested—whether in direct debate, or by correspondence, or otherwise—at least this much is necessary and that is that the subject-matter of the dispute must be clearly defined before it can be justiciable.

To demonstrate this requirement, let us consider the very example which the Applicants cite by way of illustration. If the alleged dispute had consisted of a disagreement merely as to whether "apartheid" as a theoretical conception violates Article 2 of the Mandate, then provided there is clarity on both sides as to what *apartheid* actually means, then it would perhaps have sufficed if the Applicants had alleged that *apartheid* violates Article 2 of the Mandate and Respondent had denied that allegation. But that, of course, is not the alleged dispute presented by the Applicants for the Court's adjudication. The Applicants make clear in their Memorials at pages 108 and 161 (I) what the alleged dispute is about. At page 108, we find the following, at the bottom of the page:

"Since this section of the Memorial is concerned with the record of fact, it deals with *apartheid* as a fact and not as a word. It deals with *apartheid* in practice, as it actually is and as it actually has been in the life of the people of the Territory, and not as a theoretical abstraction."

At page 161 (I) we find a statement to the same effect, also towards the bottom of the page:

> "We here speak of *apartheid*, as we have throughout this Memorial, as a fact and not as a word, as a practice and not as an abstraction. *Apartheid*, as it actually is and as it actually has been in the life of the people of the Territory is a process..."

Now, the alleged dispute, clearly then, as advanced by the Applicants, is not concerned with *apartheid* in theory but with particular legislative acts and administrative measures applied in South West Africa; and Respondent, by reason of its juridical position, has not stated its case with regard thereto, with the result that the subject-matter of the dispute has not been clearly defined.

Another argument propounded by the Applicants at page 67 (I) of their Memorials is that they have since 1954 voted to approve and adopt the annual reports of the Committee on South West Africa, which have set forth detailed criticisms of Respondent's exercise of the Mandate; and the Applicants go on to say this, at page 452 (I) of the Observations:

> "If during all the time since 1954 Respondent has not seen fit to respond to these contentions, but has continued to exercise the Mandate without regard to the criticism supported and adopted by the overwhelming number of the members of the international community, it would appear that Respondent disagrees with the criticisms. In the circumstances, Respondent's deeds have been its words."

Again, this hypothetical argument departs from the realities of the situation in this particular case. If there had been no response by Respondent to the criticism contained in the reports of the Committee on South West Africa, then there could possibly be some justification for the conclusion which the Applicants seek to draw. Respondent, however, repeatedly demonstrated that the criticisms contained in the reports of the Committee were based on unreliable information and on misconceptions of conditions prevailing in South West Africa, and thus rendered clear that its conduct in proceeding with its administration of the territory as before could not justify the inference now suggested by the Applicants.

Indeed, Mr. President, in the very next paragraph at page 453 (I) of their Observations, the Applicants refer to occasions on which representatives of South Africa addressed the United Nations on various aspects of administration in South West Africa. The Applicants say there, at page 453 of the Observations, that in so doing: "Respondent stated its position and voiced its contentions strenuously."

The records of the debates in the years 1948, 1954 and 1959 relied upon by the Applicants, however, show clearly that Respondent's participation in such debates was not with the object of stating its case in opposition to the allegations and criticisms concerning the administration of South West Africa, but was for the sole purpose of demonstrating that the complaints and criticisms were based on unreliable information and misconceptions.

Thus, Mr. Louw, in addressing the Fourth Committee at its 78th meeting on 9 November 1948 on certain aspects of the administration in South West Africa, is reported at page 307 of United Nations Document A/603, that is, the document referred to in the first footnote

on page 453 (I) of the Observations, to have prefaced his statement with the following:

> "He intended to deal with certain points relating to the administration of the Territory of South West Africa by the Union of South Africa, but he wished to make it clear that, although his Government was willing to supply information, that did not mean that it recognized that the United Nations had any right of supervision over the administration of the Territory in question."

And later at page 310:

> "Altogether, his delegation hoped that the information it had just supplied, quite voluntarily, would help to give a better picture of his Government's administration in the Territory of South West Africa."

Again at the 407th meeting of the Fourth Committee on the 15 October 1954, Mr. D. B. Sole is reported in United Nations Document A/C.4/SR/407 to have said:

> "As the Fourth Committee was aware, his Government recognized no obligation to provide the United Nations with information on South West Africa or to comment on information obtained from other sources. His delegation was in fact in a position to correct all the errors of fact or interpretation in the report, but it had no obligation, and did not propose, to do so. The report had been submitted by a committee which his Government did not recognize and it would therefore be incorrect for him to deal with it chapter by chapter. Nevertheless, and solely for the purpose of indicating how dangerous and misleading such a report could be and how it could be used to give the world an unreal picture of the situation, he would give a few illustrations of the Committee's errors in fact and judgment." (P. 68.)

The document that I have just read from is that referred to in the third footnote on page 453 (I) of the Observations.

During the year 1959, both Mr. Louw and Mr. van der Wath addressed the Fourth Committee on behalf of Respondent. The basis on which they were to participate in debates on affairs in South West Africa was clearly outlined by Mr. Louw at the 900th meeting of the Committee on 8 October 1959. Mr. Louw repeated that the juridical position taken by South Africa was that the supervisory functions to the League of Nations had not passed on to the United Nations and stated further, *inter alia*—I am reading now from United Nations Document A/C.4/SR/900 at page 85 (that is the document referred to in the second footnote on page 453 (I) of the Observations):

> "The Union of South Africa did not recognize the United Nations Committee on South West Africa, for reasons that it had stated many times. While the Union Government considered that it was not obliged to respond to the reports of that Committee, he would on the present occasion deal with certain aspects of it which related more directly to the Union Government. Mr. van der Wath, a Member of Parliament who had been associated with the Territory's

administration for many years, would later provide the Committee with information on what had been done in South West Africa, particularly with regard to the welfare of the indigenous inhabitants."

And Mr. Louw concluded his statement by saying (at p. 87 of that document):

> "He had dealt with only a few of the more outstanding misstatements and unjustified conclusions appearing in the report A/4191 but they were sufficient to show to what extent the Committee on South West Africa had been misled by information from unreliable and prejudiced sources which did not represent the Non-European inhabitants in the Territory."

It was on the same basis that Mr. van der Wath addressed the Fourth Committee at its 914th, 915th and 916th meetings in 1959. These meetings are all referred to in the footnotes at page 453 (I) of the Observations.

Now the fact that Respondent has consistently disputed the general allegation that it has violated the provisions of the Mandate—a matter to which the Applicants draw attention at page 453 of their Observations —does not detract from our contention that the subject-matter of the disagreement or conflict which in the present proceedings is alleged to exist is not sufficiently defined as to be justiciable under the compulsory jurisdiction clause.

From pages 453-456 of their Observations the Applicants devote attention to the question what is a dispute, a point which, they say, is also relevant to the question, what is negotiation?

In the first place, the Applicants, at page 454 of the Observations, draw attention to the fact that Respondent does not deny that disputes may be generated, or negotiations conducted, in the United Nations. They put it in these terms:

> "Respondent does not deny that disputes may be generated, or negotiations conducted, in the United Nations. Indeed, as has been shown above, Respondent concedes that a dispute does exist between itself and Applicants, which dispute has been generated in the United Nations, at least on issues of law."

They say further at that page:

> "It is difficult to conceive that Respondent would seriously contend ... that 'negotiations' cannot take place in a multilateral forum. Indeed, the subject-matter of the dispute in the instant cases is so particularly appropriate for discussion and consideration in the United Nations that unilateral attempts to deal with the dispute through channels unrelated to that body would engender confusion and undermine the very purposes of the Mandate and United Nations' supervision thereof."

In this respect the Applicants cite scholarly authority and state their own views with regard to the objects and purposes for which the United Nations was established.

Now the Applicants are correct in saying that we do not deny that disputes may be generated in the United Nations; nor do we contend that negotiations between States cannot take place in a multilateral *forum such as the United Nations.*

What we do contend is that for a dispute to be properly generated, and for negotiations to be properly conducted, in a particular forum (that is for an opportunity for negotiation to be afforded in such forum) both the subject-matter of the dispute and the conduct of negotiations must fall within the competency of that forum. A State, being a member of an international organization, cannot, against its own will, be drawn into a dispute in that organization on a matter beyond the competency of the organization; nor can such a State be expected to negotiate in that organization when the professed negotiations are subjected to conditions, the imposition of which is outside the competency of the organization.

Now, we concede that in fit circumstances it might be possible for the subject-matter of the alleged disagreement or conflict in the present cases to be properly raised in the United Nations and for disputes thereanent to be generated in that forum, but then, we say, it must happen with due observance of the constitution of the organization, that is the Charter of the United Nations. For instance, matters of the nature brought into complaint against Respondent in the present proceedings could competently be raised for discussion in the United Nations relative, for instance, to a Trust Territory, on the basis of accountability to that organization by the administering authority. The Charter makes provision for such accountability, in the case of a trust territory. But the Charter makes no provision for accountability to the United Nations by a Mandatory in respect of the administration of a Mandated territory not converted to trusteeship, and there is, in our respectful submission, no legal basis for the exercise by the United Nations of supervisory functions in respect of such a territory.

When, therefore, criticism of Respondent's administration of South West Africa was raised in the United Nations on the basis of accountability by Respondent for its administration to the United Nations, Respondent was, we submit, in view of its juridical position that the United Nations had no supervisory powers in respect of that territory, entitled to resist being drawn into disputes on that subject and to refuse negotiations thereanent.

In order to maintain its position, a position which we contend was justified in law, Respondent was obliged to refrain from stating its case in opposition to the complaints and allegations made in the United Nations relative to its administration of South West Africa, with the result that the differences which arose on that subject have not manifested themselves into a dispute, nor have there been negotiations thereanent.

Now, instead of meeting the crisp point made by us in this regard, the Applicants say, at page 455 (I) of their Observations:

> "In disputing and negotiating with Respondent, Applicants have set forth their views in the General Assembly and in its Committees, and have likewise acted through the organs established by the United Nations to deal with the dispute and negotiate with Respondent."

As we have shown, upon a proper analysis of the events in the United Nations, Respondent has throughout avoided a disputation of allegations concerning particular acts of violation of the Mandate, and there have, in fact, been no negotiations on that subject.

That a dispute has been generated on other matters which are purely matters of law, and that abortive negotiations were conducted in that regard, has not been denied by us. I have already dealt with that matter in the first part of the argument on this Objection.

Other arguments put forward by the Applicants on this part of the Fourth Objection also avoid the point in issue. Thus, at page 451 **(I)** of their Observations, the Applicants say that the subject-matter of the dispute—the alleged acts of violation of the Mandate—covers one of the major undertakings of the United Nations Members, and they go on to cite the provisions of Article 73 of the United Nations Charter. Now, if the criticism of Respondent's administration of South West Africa had been put forward on the basis of alleged violation of the provisions of Article 73 of the Charter, then entirely different considerations would have arisen. But that did not happen: the allegations regarding Respondent's administration were made on the basis of accountability by Respondent to the United Nations, as if the United Nations had succeeded to the powers and functions of the League of Nations under the Mandate, which is an entirely different matter, and not the same as a matter under Article 73 of the Charter.

Further, say the Applicants, the dispute concerns the United Nations itself, as an institution, inasmuch as Respondent disputes that the Organization is vested with supervisory powers over the Mandate. Of course that is part of the whole conflict. We do not deny that Respondent disputes the United Nations claim to supervisory powers over the Mandate. In that respect we concede that there is a dispute, but that does not justify a conclusion that there is also a manifested dispute on the other matters in conflict, namely, an alleged violation of the substantive provisions of the Mandate.

Finally, the Applicants take up their stand on the sacred trust of civilization and they say, at page 451 **(I)** of their Observations:

> "The dispute is of concern and interest to all States, at least those which are Members of the United Nations. This is manifest from the above-quoted portions of the United Nations Charter, as well as the history of proceedings regarding the Mandate in the United Nations. It would have been inappropriate, therefore, for Applicants to attempt solely through their own diplomatic channels or unilateral offices to determine with Respondent the future course of the Mandate, 'an international institution with an international object', especially in view of the fact that the United Nations had established Organs and procedures through which Member States could act to express their views, make their contentions known, and seek to resolve points at issue between themselves and Respondent."

Now, we do not contest the allegation that matters of Mandate administration may be of concern to all Members of the United Nations and that the United Nations would be an appropriate forum for discussion of such matters; but then such discussions must proceed upon a proper legal basis and within the competency of the United Nations. We contend that the United Nations has *no* supervisory powers over the administration of South West Africa, and Member States of that Organization, who were not Members of the League of Nations at its

dissolution, have no legal interest in the administration of that territory.

The Applicants, on the other hand, have contended, as they also do in the present proceedings, that the United Nations *has* such supervisory powers and that all Members of the United Nations have a legal interest in the administration of South West Africa.

This conflict is the crux of the whole issue as to whether, from the events in the United Nations, it can be concluded that with regard to allegations of violation of the substantive provisions of the Mandate, there exists a properly defined dispute between the Applicants and the Respondent, and whether there has been a proper opportunity for Respondent to negotiate thereanent.

Respondent has throughout taken its stand on what it contends to be the juridical position and has refused to be drawn into disputes regarding its administration of South West Africa, on the basis of accountability to the United Nations whereas, on the other hand, the Applicants and other Members of the United Nations have, at least since the issue of the 1950 Advisory Opinion, raised in the United Nations complaints concerning the administration of South West Africa on the basis of accountability by Respondent to the United Nations for such administration.

At page 456 (I) of their Observations, the Applicants in fact say:

> "In disputing and negotiating with Respondent in the United Nations during the past several years, Applicants, therefore, have been upholding their own legal interests in the proper exercise of the Mandate; but they have been doing more than that. They have also been upholding the collective legal interest of the Members of the United Nations and the interests of the Organization itself. In instituting these proceedings, Applicants have moved to protect not only their own legal interests but the legal interests of the United Nations (which, itself, may not be a party to a contentious proceeding), as well as the legal interests of every other Member State similarly situated."

Mr. President, we, I submit, have demonstrated that with regard to the matters raised in the United Nations concerning Respondent's administration of South West Africa, Respondent has, in view of its juridical position refused to account to the United Nations and to join issue with other Members of the United Nations on such matters.

We, therefore, repeat our contention that in that regard it can *not* be said that there exists a dispute, or, that if it can be said that a dispute exists, that such dispute can *not* be settled by negotiation.

Mr. President, that concludes my argument on the Fourth Objection and my address to the Court. I thank the Court.

Le PRÉSIDENT: Je voudrais maintenant demander à M. l'agent de l'Afrique du Sud s'il désire lire les conclusions de son Gouvernement.

Dr. VERLOREN VAN THEMAAT: Yes, Mr. President. May it please the Court. I now have the honour to read the submissions of the Government of the Republic of South Africa in these proceedings. They are as follows:

Submissions

For all or any one or more of the reasons set out in its written and oral statements, the Government of the Republic of South Africa

submits that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings, and that the Court has no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the *Applications* and *Memorials*, more particularly because:

Firstly, by reason of the dissolution of the League of Nations, the Mandate for South West Africa 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 Agreement as a whole, including Article 7 thereof, and

(b) in any event, with respect to Article 7 itself;

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;

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;

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.

Thank you, Mr. President.

4. ARGUMENT OF Mr. ERNEST A. GROSS

(AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA)

[Public hearing of 15 October 1962, morning]

Mr. President and honourable Members of the Court.

All who are concerned in the field of international law must regard the privilege of appearing before this Court as the climax of professional aspiration. Theirs is the knowledge that it is possible to achieve the Rule of Law only because this Court sits, and they well know that the reality will be fully achieved only when nations come to regard it as a wise exercise of sovereign responsibility to accord submission of disputes to justice a higher priority than they do resistance to jurisdiction.

Aware of this responsibility, the Applicants seek recourse to this high Court. Frustration of patient effort to settle a grave international dispute through negotiation makes it all too clear that if relief is not to be found through resort to judicial process, it is indeed difficult to find a just and orderly remedy anywhere.

For the purpose of these proceedings, I have the honour to represent the Applicants as Agent and Counsel. I am privileged to have as colleagues the Honourable Edward R. Moore, Assistant Attorney-General of Liberia, and Mr. Leonard S. Sandweiss, a member of the Bar of New York, both of whom are appearing as Counsel. The first oral argument will be made by Mr. Moore this morning, and I shall follow.

If it please the Court, I should like at this time to make a few preliminary observations and, for the convenience of the Court, briefly to indicate the scheme of our argument.

Respondent's Counsel, referring during the course of his argument to the Advisory Opinion of 11 July 1950, conceded the difficulty Respondent faces by reason of the fact that the major contentions which it now advances are, and I quote learned Counsel, "in important respects at variance or in conflict with conclusions arrived at by the Court, or by Members of the Court, in the Advisory proceedings of 1950"—the Verbatim of 2 October at page 33, *supra*. Counsel has also conceded, and again I quote, that "The sole question here is, what weight is to be assigned to the previous Advisory Opinion as a matter of authority", and he goes on to say, in his own words, "Now clearly, if the factual material before the Court now was substantially the same as the factual material in 1950 when the Advisory Opinion was considered, then that alone would mean that the Advisory Opinion would be granted strong *prima facie* weight as being of precedential value as an authority...", at page 100, *supra*, of the same Verbatim of 4 October.

As we understand it, the fundamental and, indeed, the sole, basis for Respondent's contention that the Court should reconsider and revise the 1950 Advisory Opinion is that, again in Respondent's words, "the question now before the Court is, although the same in form, very different in substance now because of the presentation of new facts..."—I quote from the Verbatim of 4 October at page 100.

At an appropriate place in our oral statement, if it please the Court, we shall endeavour to show that there is no valid, or even plausible, basis for requesting reconsideration and revision of the 1950 Advisory Opinion. Under these circumstances it would, perhaps, be sufficient for Applicants to confine our argument to a demonstration that the facts which Respondent has characterized as both "new" and "crucial" are, indeed, neither.

Nevertheless Respondent has, in its Preliminary Objections, and in its oral statements before the Court, argued the entire case on the merits *de novo*. In the process of doing so it has, in our submission, distorted the meaning and the reasoning of the 1950 Advisory Opinion. We think that Opinion means what it says. We submit that there is no ground for an argument *de novo*, and no ground for revising the Court's Opinion of 1950 with respect to the Mandate for the territory of South West Africa. The Republic of South Africa is, as the Court held, under an obligation to submit to supervision by the United Nations and to render annual reports to it, as well as to submit disputes concerning the interpretation or application of the Mandate to the arbitrament of the International Court of Justice.

In view of the grave and historic issues raised by the charges in our Applications concerning Respondent's asserted violations of the Mandate, it seems important to restore to the record of these oral statements a balance and a perspective which we feel has become distorted in the course of Respondent's oral statements.

Responsibilities assumed by South Africa in the Mandate were based upon its pledge to discharge a "sacred trust of civilization" and to give "securities for the performance of this trust"—these are the words of the Covenant of the League. Phrases of such weight and dignity tend to lose their lustre with the passage of time, but never their significance.

Respondent contends that the Mandate survives, if it survives at all, only on a basis which leaves Respondent with all the rights and privileges of possession and of administration without international accountability. Respondent does not find it appropriate to respond to the Court's conclusion in the 1950 Advisory Opinion that precisely such a result would not, in the Court's words, "be justified"—page 133 of the Advisory Opinion.

This dispute, which has subsisted for many years between Applicants and the Republic of South Africa, involves basic issues of interpretation and application of the Mandate. The dispute relates not only to words and to phrases, but to basic undertakings; not merely to whether the Mandatory misconstrues the narrower requirements of the Mandate, but whether if defies the very essence of the Mandate and deprives it of all significant effect.

Patient efforts to negotiate an end to the dispute have met with repudiation in the administrative bodies. These efforts are now rebuffed by denial of the jurisdiction of this high Court to hear and adjudicate the merits of the dispute.

Mr. President, the distinguished Agent for the Respondent, in his opening remarks, properly stressed the importance to this case of an evaluation of, and I quote his words, "of the circumstances surrounding the creation of the Mandates system and the conclusion of the Mandate Agreement, as well as the conduct of the parties concerned"—end of

quote. A substantial portion of the Preliminary Objections, as the Court will have observed, addresses itself to this matter.

If the Court pleases my colleague, the Honourable Edward R. Moore, will summarize for the Court the origins and nature of the Mandates system, and will trace the evolution of that system briefly and the major developments in the history of the Mandate involved in the case at bar. Following Mr. Moore's presentation I shall, if the Court please, examine and reply to Respondent's contentions in its Preliminary Objections and in its oral statements; I shall endeavour to show that Respondent offers no factual basis for re-opening and revising the 1950 Advisory Opinion, and that Respondent's arguments *de novo* lack merit and should be rejected.

Mr. President and honourable Members of the Court, this concludes my introductory statement and, if the Court please, the Honourable Edward R. Moore will now address the Court.

5. ARGUMENT OF Mr. EDWARD R. MOORE

(COUNSEL FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA)

[Public hearing of 15 October 1962, morning]

Mr. President and Members of the Court.

Permit me first to associate myself with the assurance of my colleague of our feeling that we are being very highly honoured today by this opportunity to appear before you, and to present the arguments of the Governments of Ethiopia and of Liberia in their dispute with the Government of the Republic of South Africa. The esteem in which we hold this honourable Court, and its judgments and opinions, is particularly demonstrated by the manner in which we, together with other United Nations Members, have consistently attempted to resolve our disputes with Respondent by the rule of law which, in the international community, receives its definite exposition by this Court. After the dissolution of the League, and after the United Nations refused to consent to incorporation of the Mandated territory by Respondent, when Respondent began to allege that its duties under the Mandate had lapsed, and that no one else had any legal interest in the Mandate whatever, controversy naturally arose with respect to the Mandate. Since there was no agreement under law, it was decided to pursue the obviously logical course, to take the matter to Court and to receive a definite statement of what the law is, and this Court ruled on the law.

Having received, then, an authoritative statement of the relevant law and being determined to settle the issue by the *rule of law*, Applicants and other United Nations Members again, logically enough, negotiated with Respondent on means whereby to implement the Court's opinion. These negotiations have obviously failed.

When the question subsequently arose as to whether a rule of voting procedure in the General Assembly, relating to the Mandate, was consistent with the Court's opinion, again it was decided to go to Court for the answer, which was given.

Finally, when discussion ensued on the question of whether oral hearings to petitioners on matters relating to South West Africa was consistent with the Court's opinion, the matter was taken to Court to obtain a definitive answer, which also was given.

These proceedings, therefore, represent the fourth attempt at judicial settlement of questions relating to the Mandate, and I am honoured to be part of this delegation which is here in an effort to have the dispute with Respondent settled finally and irrevocably, again by the rule of law, in a contentious proceeding which will be formally binding not only upon Applicants but upon Respondent as well.

What I shall endeavour to do at this stage of our oral submission is to present the facts of this case. After reading the Preliminary Objections and listening to the arguments of the Respondent, we consider that the history of the Mandate and of this dispute must be restated, however briefly, since in significant areas they have either been ignored or, in our

submission, not properly characterized by Respondent, and since a proper appreciation of these facts is vital in assessing the legal arguments.

The historical propositions which we are here to present are not novel, but already constitute an important part of international jurisprudence. This honourable Court, in its Advisory Opinion of 11 July 1950, has already affirmed the validity of certain basic historical truths, and I quote from the Court's Opinion on pages 131 and 132:

> "The Territory of South-West-Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles, renounced all her rights and titles in favour of the Principal Allied and Associated Powers. When a decision was to be taken with regard to the future of these possessions as well as of other territories which, as a consequence of the war of 1914-1918, had ceased to be under the sovereignty of the States which formerly governed them, and which were inhabited by peoples not yet able to assume a full measure of self-government, two principles were considered to be of paramount importance [may I repeat, of 'paramount impportance']: [these were] the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'."

After characterizing the Mandate, the Court summed up by stating, at page 132:

> "The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this [new] international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants."

With the foregoing basic truth concerning the Mandate in mind, I should like now to sketch briefly the nature and origin of the Mandates system.

By the beginning of World War I, there had developed a great pressure for the reform of colonial policies which had existed prior thereto, not only with regard to the so-called "scramble for Africa" which had been going on during the nineteenth century, but with regard as well to other colonial areas.

At the Peace Conference following the termination of hostilities, however, two opposing points of view speedily became evident.

There were those who were determined on outright annexation of the German overseas colonies; others were so suspicious of colonial administration that they wished to make the League of Nations, which was to be established, the administrator of the territories in question.

The ensuing disputes regarding the former German colonies were resolved, finally, largely on the basis of proposals formulated by General Smuts and others, and I read now a part of the proposal of General Smuts, which had the most effect in the final result of the Mandates system:

> "(2) That so far at any rate as the people and territories formerly belonging to Russia, Austria-Hungary, and Turkey are concerned

the League of Nations should be considered as the reversionary in the most general sense as clothed with the right to ultimate disposal in accordance with certain fundamental principles.

[3] These principles are: first, that there shall be no annexations of any of these territories to any of the victorious powers, and secondly, that in the future government of these territories and people the rule of self-determination or the consent of the governed to their form of government shall be fairly and reasonably applied."

Although General Smuts himself, and his Government, did not at first favour the application of the Smuts proposal to colonies in the Pacific and Africa, as explained above, nevertheless South Africa's undertaking *in assuming the Mandate conformed, basically, to the principles of the* proposal. Indeed, the record would indicate, in our submission, that without such an undertaking Respondent would probably not have been permitted to administer South West Africa at all. As Temperley puts it, "a general application of the Mandates system was insisted upon".

Thus the result of disputes, debates and negotiations was a compromise. The victorious Powers agreed that instead of implementing either of the opposing views above mentioned, either outright annexation on the one hand, or direct administration by the League on the other, the former German colonies would be put under a mandate system, with modern States as Mandatories, under the supervision of the new international organization, the League of Nations. The two major features of the system constituted the compromise, which was that there was to be no annexa*tion and the undertaking that the Mandate should be for the benefit* of the people of the Territory. In order to ensure these features, Article 22 of the League Covenant called for "securities of the performance of this trust". As Applicants have noted at page 459 (I) of their Observations, the authors of this formula were not content to depend solely upon the conscience, or, indeed, the competence of the Mandatory for the proper exercise of the Mandate; rather, they devised a system which was made subject to the authority of the League and its Members to require the Mandatory to report, account and, if necessary, submit to adjudication consistent with their fiduciary role, and Mandatories were required to consent to the Court's jurisdiction in advance.

Thus it has been shown, though one should think it unnecessary to do so except for the curious arguments of the Respondent, it has been shown that the formula arising from the compromise was intended to bind all concerned to its terms, not to be used as proof that originally one or other of the parties to the Mandate Agreement, based upon the compromise, should be allowed to convert his original ambitions into a right.

As to the second point that not the Mandatory but the inhabitants of a territory should be beneficiaries of the arrangement, Article 22 of the Covenant of the League of Nations provided in paragraphs 1 and 2 the following:

"1. To those ... territories ... 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.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced

nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it [I repeat, and who are willing to accept it], and that this tutelage should be exercised by them as Mandatories on behalf of the League."

Article 2, paragraph 2, of the Mandate for South West Africa reiterated the emphasis upon the question who were to be the beneficiaries:

"The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

Briefly, it may safely be stated that the extent of power granted a Mandatory was based not upon how much the League or the Principal Allied Powers desired to award the Mandatory, but upon the needs of the inhabitants.

Such was the compromise, the formula, for a new type of relationship between peoples of different cultures and institutions. In the case of Mandates, the principle of "sacred trust" succeeded to the doctrine of rights of conquest, and history records that the principle—though necessarily writ large and broad in scope—has borne fruit and has evolved into practical realities. The following includes a list of all the original Mandates, or at least most of them, Mr. President, and their disposition as of this time:

1. The French Mandate for Syria and the Lebanon which has resulted in independence for both of these countries.
2. The British Mandate for Palestine, which has resulted in independence.
3. The British Mandate for the Cameroons (British Cameroons) has also resulted in independence.
4. The French Mandate for the Cameroons has resulted in independence.
5. The French Mandate for Togoland has resulted in independence.
6. The Belgian Mandate for Ruanda-Urundi has also just recently resulted in independence.
7. The Japanese Mandate for the German possessions in the Pacific Ocean lying North of the Equator has been converted into a United States trusteeship.
8. The Australian Mandate for the German Possessions in the Pacific Ocean situated South of the Equator other than German Samoa and Nauru (referring, mainly, to New Guinea) has been converted into a trusteeship.
9. The New Zealand Mandate for German Samoa has been converted into a trusteeship.
10. The Birtish Mandate for Nauru has been converted into a trusteeship.

But, and this is the one exception, Mr. President, the South African Mandate for German South West Africa has resulted in neither independence nor trusteeship.

In spite of the historical record I have just presented of Mandates and what has happened to them, the consistent historical position of South Africa since the early post-war years has been that the Mandate

has lapsed and that it is accountable to no-one with respect to it. Thus with respect to every Mandate, as I have noted, except for the one questioned here in the sense of Respondent's attitude toward it, the ideal of "sacred trust" has maintained its vitality for more than forty years, manifesting itself in some instances in independence, and in other instances continued tutelage in the form of trusteeships. History can only confirm that the so-called compromise arising from the Peace Conference in Paris has had a meaningful, creative, and, with only one possible exception, eminently successful existence.

Applicants' statement of the history of Respondent's administration of the territory up to the beginning of World War II has been set forth in their Memorials at pages 37-43 (I). No further comment is required at this time, except to point out that the policy of "closer assimilation", to use Respondent's words at page 223 (I) of his Objections, which Respondent continuously sought to apply with respect to the Mandated territory, was a matter of frequent concern to the Permanent Mandates Commission during that period.

Illustrative of such concern is a statement by the Permanent Mandates Commission, which I should now like to quote, in part, for the Court's convenience:

> "The Permanent Mandates Commission notes with regret that, in spite of all its previous discussions on this subject and all the correspondence exchanged between the Council of the League of Nations and the Government of the Union of South Africa in 1927 and 1928, it has never received an explicit answer to its repeated question on the meaning attached by that Government to the term 'full sovereignty' used to define the legal relations existing between the mandatory Power and the territory under its mandate.
>
> That question may be formulated as follows: In the official view of the Government of the Union of South Africa, does the term 'possesses sovereignty' express only the right to exercise full powers of administration and legislation in the territory of South West Africa under the terms of the Mandate and subject to its provisions and to those of Article 22 of the Covenant, or does it imply that the Government of the Union regards itself as being sovereign over the territory itself?
>
> As long as no clear reply to this question is received, the Commission fears that a regrettable misunderstanding will subsist, which it therefore hopes the Council may succeed in finally clearing up."

The foregoing takes us to the period of World War II, and the ensuing dissolution of the League and establishment of the United Nations. I should like now to discuss the relevant events during this period of transition.

In March 1945, all States parties to the United Nations Declaration of 1942, and all other Allies were invited to take part in a conference at San Francisco (that is the United Nations Conference on International Organization) to agree on a Charter for the United Nations.

The problem of colonial territories was considered by Committee 4 of Commission II of the San Francisco Conference, and on 11 May 1945 Dr. D. L. Smit, the South African delegate, informed the Committee

that South Africa later intended to seek approval for annexation of South West Africa. This statement was made for the information of the Committee only, Dr. Smit said, and his submission was as follows:

> "The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.
>
> As territorial questions are however reserved for handling at the later Peace Conference where the Union intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the Mandate question."

Meanwhile, Five Power discussions, on the basis of Australian and British proposals made in Committee II/4, were taking place, and by 15 May 1945 a working paper could be presented to that Committee, but not as the proposals of the major Powers, or indeed of any State, as full agreement with regard to non-self-governing territories had not been achieved. The paper, however, served as the basis for all further discussion of the colonial question, and Section A thereof developed into Chapter XI of the Charter, while the Trusteeship system grew out of Section B. The full history of the evolution of these Charter provisions is quite complex, but for present purposes, only the history of paragraph B, 5, which in its final form became Article 80 of the Charter, need be considered in detail.

Paragraph B, 5, the basic purpose of which appears from a heading of a section of the Report of Committee 4 of Commission II, that is "Maintenance of Existing Rights", was aptly referred to during discussions as the "Conservatory Clause" and as originally presented to the Committee provided:

> "Except as may be agreed upon in individual agreements placing each territory under the trusteeship system, nothing in this Chapter should be construed, in and of itself, to alter in any manner the rights of States or any peoples in any territory."

At the ninth meeting of Committee 4 of the same Commission, the delegate of the United States amended the original draft of the proposed Conservatory Clause so that it specifically preserved the provisions of the Mandate instrument. The paragraph then read as follows:

> "5. Except as may be agreed upon in individual arrangements, made under paragraphs 4 and 6, placing each territory under the trusteeship system, nothing in this Chapter shall be construed in and of itself to alter in any manner the rights of any States and peoples in any territory, or the terms of any Mandate."

The Conservatory Clause was adopted in this first form at the tenth meeting of the Committee at which the United States delegate furnished an explanation of the provision.

The Summary Record of that meeting notes that:

> "The delegate for the United States stated that paragraph B, 5, was intended as a conservatory or safeguarding clause. He was willing and desirous that the minutes of this Committee show that it is intended to mean that all rights, whatever they may be, remain exactly the same as they exist—that they neither increased nor

diminished by the adoption of this Charter. Any change is left as a matter for subsequent agreements. The clause should neither add or detract, *but safeguard all existing rights*, whatever they may be."

An amendment to paragraph 5 was proposed at the Thirteenth Meeting by the United States to meet Soviet fears that a provision which preserved rights under the Mandate system indefinitely might be seriously abused by Mandatory Powers. (See Russel and Muther, *A History of the United Nations Charter*, p. 829.) This in substance stated that nothing in the paragraph should afford grounds for delay in conclusion of Trusteeship Agreements, and this became Article 80, paragraph 2, of the Charter. In introducing the amendment, Commander Stassen stated:

"Then we add a new sentence:

This paragraph should not be interpreted as giving grounds for delay or postponement of the negotiations and conclusion of the agreements for placing mandated and other territories, as provided for in paragraph 3, under the Trusteeship System.

Now, there are a number of factors that come into the amendment that we are proposing. Let me state, in the first instance, that this does not change the conservatory nature of the clause as we originally proposed it, but it does clarify and take away some of the possible misinterpretations that have been raised.

It is clear that paragraph 5 is intended to preserve the rights during that in-between period from the time this Charter is adopted and the time that the new agreements are negotiated and completed with the new Organization. And it is not intended that paragraph 5 should be any basis of freezing eternally the situation affecting any territory." (See the Verbatim Minutes of Thirteenth Meeting, 8 June 1945, Nos. 24, 25, U.N. Achives, Vol. 70.)

Finally, at the Thirteenth Meeting of Committee 4, Commission II, a further United States amendment was adopted which extended the operation of the Conservatory Clause to all international agreements with respect to Mandated territories.

At the same time that the United Nations Charter was signed, States agreed by separate instrument to establish a preparatory commission to make provisional arrangements for the First Session of the General Assembly, the Security Council, the Economic and Social Council, for the establishment of the United Nations Secretariat and for the convening of the International Court of Justice. Among the many matters considered by the Preparatory Commission, in this regard, were the assumption of functions of the League of Nations by the United Nations, the transfer of assets to the new body and the setting up of the Trusteeship system. The Executive Committee of the Preparatory Commission proposed the creation by the General Assembly of a temporary Trusteeship Committee to carry out certain of the functions assigned in the Charter to the Trusteeship Council pending its establishment. (U.N. document TC 1131.)

The central purpose of the proposed Temporary Trusteeship Committee was explained by the Chairman of Committee 4 of the Preparatory Commission. Said he:

"The basic task of the Temporary Trusteeship Committee, as it was contemplated, was to assist the General Assembly in expediting the establishment of the Trusteeship System and was to remain in existence until a sufficient number of trusteeship agreements had been concluded to promote of the Permanent Trusteeship Council in accordance with Article 86 of the Charter." (General Preparatory Commission, Fourth Plenary Meeting, p. 125.)

A certain delay in the completion of trusteeship agreements seemed probable, some delegates stated, and until a sufficient number of such agreements were concluded the Trusteeship Council could not be established so that the General Assembly would not have an expert body to assist it in colonial problems, particularly those in regard to the establishment of the new system. However, the Soviet delegate, supported by other delegations, was of the opinion that the proposed Temporary Trusteeship Committee might delay rather than accelerate the establishment of a Trusteeship Council and that its creation was not authorized by the Charter of the United Nations. The nature of the Soviet objection should be understood. It was not argued that the General Assembly was incompetent to supervise performance of Mandate Agreements, nor was it contended that the General Assembly might not establish an auxiliary organ to assist it in regard to colonial territories. The objection was rather that the Temporary Trusteeship Committee envisaged by the Executive Committee was not in fact an auxiliary organ which might be set up under Article 22 of the Charter.

At the same meeting of Committee 4 of the Preparatory Commission, South Africa supported the view that creation of an interim body might expedite the establishment of a Trusteeship Council and added a proposal, not discussed by any other delegation, that a Temporary Trusteeship Committee might supervise administration of Mandated territories.

The summary record of the second meeting of Committee 4 reports the South African delegate as follows:

"Mr. Nicholls of the Union of South Africa said that he had followed the arguments against the establishment of a temporary organ most closely. It seemed to him that they were based on the one hand on constitutional grounds; on the other, on expediency. The delegation for the Soviet Union might be right, but that was a legal question. The Committee might seek legal judgment on a question if doubt existed amongst some of the delegations.

On the question of expediency, it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and the countries holding Mandates should have a body to which they could report. The delegate for Yugoslavia found difficulty in interpreting the phrase 'States directly concerned'. Mr. Nicholls took this to mean that any colonial power which would place colonies under the trusteeship system was at liberty to do so. There could be no other way to urge them to do so than by setting up an interim Committee."

Now, the nature of the Soviet legal objections to the establishment of an interim body has already been indicated. More importantly on a practical level, the Soviet Union believed that trusteeship agreements could be concluded and the Trusteeship Council established far sooner

than plans for creation of a Temporary Trusteeship Committee seemed to imply. Such a body was unnecessary and might diminish the incentive of States to enter into Trusteeship agreements at an early date. It was pointed out that in the event of undue delay in completion of trusteeship agreements it was open to the General Assembly at any time to establish any body which seemed necessary. The Soviet delegate is reported as arguing, with reference to a Temporary Trusteeship Committee or an *ad hoc* Committee, that he was not surprised that the Mandatory powers were in favour of substitute organs, but if the problem were dealt with along these lines, discussion could continue for months or years without any action being taken.

The Temporary Committee would, in fact, delay these provisions of the Charter (that is the Trusteeship provisions) rather than speed them up. His Government considered it would not be advisable to establish an artificial organ, as other more practical and more speedy means existed.

The practical steps referred to included the making of declarations by Mandatory Powers that they intended to place their territories under trusteeship, and the presentation of draft trusteeship agreements.

Yugoslavia, during the third meeting of the Committee, presented written proposals as to the course which should be adopted. It suggested that:

> "From that moment until the second part of the first session, the States directly concerned should conclude trusteeship agreements. If these agreements covered strategical areas, they should be submitted for approval of the Security Council, but if these agreements concerned only non-strategical areas, they could be submitted to the General Assembly during the second part of the first session. An *ad hoc* committee of the General Assembly to examine these declarations of the present mandatory powers could usefully be formed."

The ensuing two chief matters of debate were (1) the time within which trusteeship agreements could be submitted, and (2) the question of whether an *ad hoc* committee should be established. With respect to the desirability of an *ad hoc* committee the Chinese delegate took the view at the tenth meeting of the Fourth Committee that the whole problem of transition was one of a short duration, and that even an *ad hoc* committee was unnecessary.

> "He" (that's the Chinese delegate) "pointed out that the Committee was divided on the question of setting up a temporary or *ad hoc* committee. Those who were opposed to a temporary organ considered that one agreement would suffice for bringing the Trusteeship Council into being. He doubted the soundness of the suggestion.
>
> However it was not absolutely necessary to set up the temporary *ad hoc* committee in view of the fact that the General Assembly would have a main trusteeship committee dealing with trusteeship matters in any case. If trusteeship agreements were submitted in the interval between the first and second part of the first session of the General Assembly, that main committee could decide what was the best thing to do at the second part of the first session of the General Assembly. It could also decide what was to happen if

> it were not possible to create the Trusteeship Council until after the end of the first session of the General Assembly.
>
> He therefore urged that use should be made of the main trusteeship committee of the General Assembly, thus leaving the question of a temporary or *ad hoc* committee for the General Assembly itself to decide. If this plan could be adopted, it would answer all questions."

Following a reference of the whole matter to a sub-committee, Committee 4, and later the Preparatory Commission, it was decided not to make a recommendation with respect to the establishment of an auxiliary body, proposing simply that the General Assembly should adopt those methods which appeared most appropriate.

As has been mentioned earlier, the Respondent strongly supported proposals for establishment of a temporary trusteeship committee, and even suggested that it might supervise administration of Mandated territories. However, the Respondent found greater difficulty in accepting the alternative proposals for speedy completion of trusteeship agreements, which were adopted in the final report. At the tenth meeting of Committee 4 of the Preparatory Commission the Respondent pointed to the problems smaller States might experience in quickly submitting trusteeship agreements because of the restricted staff at their disposal, and mentioned also that in some instances it would be necessary to consult inhabitants of Mandated territories as to their future. At the fifteenth meeting of Committee 4 that State made certain statements. It is to these statements I now desire to turn.

The Summary Record of the tenth meeting of Committee 4 reads as follows:

> "Mr. Nicholls (Union of South Africa) stated that on all material points the proposals seemed to be indentical. But the time factor had not been sufficiently considered, not only because of the difficulties of the restricted staff available in small countries but also in view of the need for consultation of the native population, notably in such a territory as Palestine. The time limit in the Yugoslav proposal would be insufficient. He preferred that the United Kingdom modification, 'at the earliest possible opportunity thereafter', should take the place of the original Yugoslav wording, 'the second part of the first session of the General Assembly'."

The Summary Record of the fifteenth meeting of Committee 4 of 20 December 1945 reports that:

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

do everything in its power to implement the Charter. For these reasons South Africa abstained from voting on the Report of Committee 4 in that Committee."

Advancing to some positive steps taken later in the General Assembly, I should like to note that on 9 February 1946 the General Assembly adopted a resolution with respect to non-self-governing territories and trusteeship agreements which, with respect to Chapters XII and XIII of the Charter, noted that:

"The General Assembly . . .

Welcomes the declarations made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories and, in respect of Transjordan, to establish independence.

Invites the States administering territories now held under mandate to undertake practical steps, in concert with other States directly concerned, for implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the trusteeship system), in order to submit these agreements for approval, preferably not later than during the second part of the first session of the General Assembly."

Intent upon securing completion of trusteeship agreements at an early date, the General Assembly had preferred not to establish an interim body to receive reports from Mandatory Powers, at least for the time being.

On 12 April 1946 the Chinese delegation introduced a draft resolution with respect to the Mandate system which was ultimately adopted by the Assembly of the League. The minutes state:

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

It is noted that:

"It was gratifying to the Chinese delegation, as representing a country which had always stood for the principles of trusteeship, that all Mandatory Powers had announced their intention to administer the territories under their control in accordance with their obligations under the mandates system until other arrangements were agreed upon. It was hoped that the future arrangements to be made with respect to those territories would apply in full the principle of trusteeship underlying the mandates system."

However, as it had previously stated it would, Respondent placed before the General Assembly of the United Nations "for judgment", as it said, its plan to incorporate South West Africa. On 14 December 1946 the United Nations General Assembly considered Respondent's plan for incorporation and, by resolution, the Assembly found itself "unable to accede to the incorporation of the territory", and recommended a trusteeship for the territory.

In spite of the recommendation of the General Assembly that Respondent place the Mandated territory under trusteeship, as well as an earlier recommendation to the same effect, Respondent declined to do so and, obviously, has consistently declined to do so.

Respondent to this day views recommendations to negotiate a trusteeship agreement as, to use their word again, "extreme".

Respondent in 1947 submitted a report to the General Assembly for the year 1946. Respondent's report was reviewed by the Trusteeship Council which, in 1948, issued its comments on the report. The comments, it may be noted, were highly critical of Respondent's administration of the Mandated territory. Two illustrative comments which are included in the Memorials at pages 45 and 46 (I), were as follows:

> "(1) The Council, being convinced of the desirability of increased participation by indigenous populations in the direction of their own affairs, notes that the indigenous inhabitants of the Territory have no franchise, no eligibility to office and no representation in the governing bodies or in the administration of the Territory."

And, later on:

> "(3) The Council is opposed, as a matter of principle, to racial segregation. The Council, while lacking precise information as to the reasons for the urban segregation policy in the Territory, considers that great efforts should be made to eliminate, through education and other positive measures, whatever reasons may exist that explain segregation."

Respondent never again submitted a report to the United Nations on conditions in the Mandated territory.

By the end of 1949 Respondent had refused to follow further recommendations from the General Assembly that it conclude a trusteeship agreement. It was at the same time openly avowing that the Mandate had lapsed, and consequently, that its duties with respect to the Mandate had lapsed. It was evident that a definitive statement of the law regarding the Mandate was required and, accordingly, the General Assembly deemed it advisable to ask this Court for an advisory opinion. After receiving both written and oral arguments from the Respondent, as well as argument from other interested parties, the Court gave its Opinion. Having received the Court's Opinion as to the law of the case, and being determined to settle the dispute with Respondent on the basis of law, Members of the United Nations attempted, throughout the ensuing years, to negotiate, through various committees and agencies of the United Nations established for that purpose. Such a basis has consistently been characterized by Respondent as being "in the nature of restrictive terms of reference", employing their phrase. Throughout the years following the Advisory Opinion, Respondent not only disputed the Court's Opinion by unearthing so-called new facts concerning the original

Chinese intention to which it alludes in its proceedings, but it also proceeded to re-argue the case before the United Nations. Illustrative of this argument was Respondent's statement in the Fourth Committee of the General Assembly, which reads as follows, in part:

> "... the International Court also expressed the view that the obligations which South Africa had assumed originally with regard to the sacred trust remain legally in force, i.e. that South Africa continued to have an international responsibility with regard to the sacred trust. This view was subscribed to by the majority in the United Nations. My Government, on the other hand, did not—and in fact does not—agree with this view—holding, that since one of the two parties to the original contractual arrangement had disappeared, the mandate had lapsed and that it could no longer be regarded as a legally binding contract."

During this same period, Respondent's disregard of the Court's opinion found further expression on numerous occasions. One such occasion was a speech by Respondent's Prime Minister in 1956 before the Senate of South Africa, in which the Prime Minister stated:

> "It is well within our power, and fully within our power, to incorporate South West Africa as part of the Union. Up to now we have declared unto the world that legally and otherwise that is the position, but that in the meantime we are prepared, although we do not for one moment recognize the rights of the United Nations Organization, even should we one day incorporate South West Africa, to govern South West Africa in the spirit of the old Mandate. So whether we will proceed at a later stage to carry out and put into effect what we regard as *our* rights, over which nobody has anything to say, that will depend on how circumstances develop in the future."

With such divergent views, it is no wonder, Mr. President, that negotiations have failed to settle the dispute between Applicants and Respondent. Applicants have consistently negotiated on the basis of the Court's Opinion, and Respondent has consistently negotiated on the basis that the Court's Opinion was wrong and that, indeed, Respondent has the right to incorporate the Mandated territory and no one else has any right to object. Examples of Respondent's frequent avowals that the dispute could not be settled are set out on pages 472 and 474 (**I**) of the Observations, and there is no need to repeat them here.

Following the Court's Opinion, and after it became evident that Respondent would not abide by the Opinion, the General Assembly nevertheless considered it its duty to afford supervision without which the "inhabitants of the territory are deprived of the international supervision envisaged by the Covenant of the League of Nations", and therefore established the Committee on South West Africa with the mission, *inter alia*, to "examine, within the scope of the questionnaire adopted by the Permanent Mandates Commission of the League of Nations in 1926, such information and documentation as may be available in respect of the territory of South West Africa".

Ethiopia, one of the Applicants herein, has been a Member of that Committee. The Committee on South West Africa, in its annual report, has sharply criticized Respondent's administration of South West

Africa. An example of such criticism, and the deep concern felt by the Committee, may be found in the Committee's concluding remarks in its report for 1956, which reads as follows:

"For the third year in succession, the Committee has been unable to escape the conclusion that conditions in the Territory after nearly four decades of administration under the Mandates System are for the most part—and particularly for the 'Native' majority—still far from meeting in a reasonable way the standards of either endeavour or achievement implicit in the purposes of the Mandates System and in the attitudes prevailing generally today in respect of peoples not yet able to stand by themselves. The 'Native' of South West Africa still has no part whatsoever in the management of the Territory's affairs; he lives and works in an inferior and subordinate status in relation to a privileged 'European' minority and his opportunities for advancement in his own right are limited not only by the inadequacy of technical facilities but also by a restrictive system of law and practice. The Committee deplores the existing conditions of the 'Native' and other 'Non-European' inhabitants and the slow rate of their improvement. It is even more seriously disturbed by the absence of any sign of the radical changes which must be made in these policies if they are to conform with the principles which led to the establishment of the Mandates System. It finds no grounds for altering its belief that the main efforts made in the administration of the Territory are directed almost exclusively in favour of the European inhabitants, often at the expense of the native population."

[Public hearing of 15 October 1962, afternoon]

Mr. President, before the noon recess I undertook to set forth to the Court an extract from a report of the Committee on South West Africa. As you know, and as we have noted in the Memorials of the Applicants, this is not the only report of its kind from the Committee but is merely representative of several reports of the same nature. Now I should like to read the conclusion of the same report for 1958 of the Committee on South West Africa:

"The Committee feels that it should point out that its present assessment of conditions in the Territory is the result not of an isolated study of these conditions but the continuation of a process in which it has been engaged for five years. The new information coming before it in each of those years has served to confirm, not to cast doubt upon, its conclusions as to the main lines of policy in the administration of the Territory and as to the manner in which that policy has been applied.

No important changes have appeared in the situation previously described by the Committee. The life of the Territory continues to present two distinct and separate aspects. On the one hand, the Committee has been able to report the continued free political activity of the 'European' section of the population, the influential role which it plays in the institutions of government, and the further expansion and prosperity of the mining, agricultural and commercial enterprises which it owns or controls or which otherwise provide

it with livelihood. On the other hand, the Committee has shown that the vast majority of the population, classified as 'Non European', continues to be deprived on racial grounds of a voice in the administration of the Territory and of opportunities to rise freely, according to merit, in the economic and social structure of the Territory. The 'European' community, which alone enjoys political rights, shares with the Mandatory Power, to the exclusion of the 'Non Europeans' control over the allocation and development of the principal resources of the Territory, reserving for itself a disproportionate interest in those resources. The inferior political, economic and social status of the 'Non Europeans' results form arbitrary and racially discriminatory laws. By means of discriminatory legislative and administrative acts, authority and opportunity are retained as a matter of policy in the hands of the 'European' population, while the 'Non European' majority is confined to reserves except to the extent that its manpower is needed in the 'European' economy in the form of unskilled labour and under strict regulation.

The Committee therefore reaffirms its conclusion that existing conditions in the Territory and the trend of the administration represent a situation not in accord with the Mandates System, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly."

During the period to which I have been referring, the Liberian Delegate to the Fourth Committee had occasion to express the views of his Government with respect to the administration of the Mandate. At the 575th meeting of the Fourth Committee, on December 14, 1956, he stated:

"In view of the fact that the Union of South Africa was a Member of the United Nations and a signatory to the Charter, under which it had certain obligations as well as rights, that South West Africa was a Mandated Territory which the South African Government had held as a sacred trust, and that the Charter of the United Nations provided for the protection of the fundamental rights of the indigenous inhabitants, it was clear that the abuse of the international mandate by the South African Government could not, and must not, be perpetuated."

And at the 659th meeting on October 2, 1957, the Liberian delegate stated:

"The Union of South Africa had violated the Mandates System, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly. Some action should be possible if all the Members of the United Nations were to co-operate. The contention of the Union Government that the Mandate had lapsed with the demise of the League of Nations was neither legally nor morally valid."

By the end of 1957, it became obvious that further legal action with respect to the Mandate might be required. Indeed, the General Assembly, by Resolution, requested the Committee on South West Africa to study the question of:

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

Later the same year the Committee submitted a special report containing its answers. Appropriate citations are set forth at page 75 (I) of the Memorials.

In June of 1960, the Second Conference of Independent African States met at Addis Ababa. States participating in the Conference were Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, the Sudan, Tunisia, and the United Arab Republic. At that Conference, the Secretary of State of Liberia noted in part:

"In the light of the resolutions passed at the last session of the United Nations Assembly, my Government, as a former Member of the League of Nations at the time of its dissolution, has already indicated its determination on behalf of all the African States, to pursue further action to get this territory placed under the Trusteeship provisions of the Charter. We are pleased to know that in this we have the support and co-operation of other African States. This matter will be discussed at this conference and it is hoped that final decision for further action will be taken before we adjourn."

The Conference thereafter gave full consideration to the question of South West Africa. A resolution was unanimously adopted on June 23, 1960, setting forth, *inter alia*, that the Conference:

"1. Concludes that the international obligations of the Union of South Africa concerning the Territory of South West Africa should be submitted to the International Court of Justice for adjudication in a contentious proceeding;

2. Notes that the Governments of Ethiopia and Liberia have signified their intention to institute such a proceeding..."

Thereafter, on November 4, 1960, Ethiopia and Liberia filed Applications with this Court in which, in effect, the Applicants requested the Court to re-affirm its Advisory Opinion and in addition to adjudge and declare that Respondent had violated the Mandate. Applicants have alleged, *inter alia*: first, that Respondent practises its policy of *apartheid* in the Mandated Territory and that such practice is in violation of the Mandate; and second, that Respondent has treated South West Africa in a manner inconsistent with the international status of the Territory.

At the close of 1960, following fourteen years of frustration of efforts on the part of numerous agencies of the United Nations to negotiate with the Union, the General Assembly, in resolution 1565 (XV), concluded that:

"... the Government of the Union of South Africa has failed and refused to carry out its obligations under the Mandate for the Territory of South West Africa, [that] the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating

> to the interpretation and application of the mandate has not been and cannot be settled by negotiation, [and that] *the General Assembly* . . . *Commends* the Governments of Ethiopia and Liberia upon their initiative in submitting such dispute to the International Court of Justice for adjudication and declaration in a contentious proceeding in accordance with Article 7 of the Mandate."

Mr. President, this brings me to the conclusion of my part of the Applicants' presentation. I have attempted to relate to the Court that Applicants believe that the most significant aspect of the Mandates system is the "sacred trust" for the well-being of hundreds of thousands of human beings. I have also attempted to present accurately the events of the period of transition between the demise of the League and the establishment of the United Nations, showing that the goal was trusteeship with the hope of eventual self-government on the parts of the inhabitants of that territory.

Finally, I have attempted to present the facts which show how, and why, Applicants have a dispute with Respondent, and why, in our submission, the dispute cannot be settled by negotiation.

I thank you very much for this opportunity, Mr. President. My colleague, the Honourable Ernest A. Gross, will present the rest of the arguments on the part of the Applicants.

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6. ARGUMENT OF Mr. ERNEST A. GROSS (CONT.)
(AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA) AT THE PUBLIC HEARINGS OF 15 TO 17 OCTOBER 1962

[Public hearing of 15 October 1962, afternoon]

Mr. President, and Members of the Court.

If the Court please, I shall continue and conclude Applicants' response to the Oral Statements presented to the Court by Respondent's Counsel.

The distinguished Agent for the Respondent took occasion, in his opening remarks, to note the statement in our Observations, at page 421 (I), to the effect that the account of relevant historical facts set out in Applicants' Memorials had "not been materially altered in the Respondent's version", that is, the version in their Preliminary Objections. From this statement, Respondent's Agent drew an inference that Applicants "do not dispute Respondent's *analysis* of the relevant historical facts".

My colleague's presentation has, I think, made clear the distinction that is to be drawn between a substantially similar *account* of facts, on the one hand, and a substantially differing *analysis* of the same facts, on the other.

In the respective analyses of the facts, as between the Applicants and the Respondent, involving interpretation and inferences to be drawn from the same facts, there exists a wide gulf between the position of the Parties.

We sought to make clear our conviction that Applicants and the Respondent entertain quite different notions as to the true nature of the Mandates system, as well as the significance of Respondent's undertakings with respect to the Mandate.

Immediately following our comment in the written Observations, to the effect that Respondent's version of the facts had not materially altered or differed from our own, we refer to the undue emphasis Respondent gives to statements of certain authors whose point of view is that the "C" Mandates were, in effect, as they say, "not far removed from annexation". Furthermore, at page 423 (I) of our Observations, we note the stress Respondent lays upon the so-called "political compromises" which occurred in fashioning the Mandates system. We note further the significance of the reasoning of Respondent's analysis (on pages 216-223 (I) of the Preliminary Objections) in this respect: for example, as to the implications which may be drawn from Respondent's comment, at page 223 (I), expressing resentment at what are characterized as *our* attempts (as Applicants' attempts) to "repudiate the compromise whereby Respondent was *induced to agree* to the Mandates system being rendered applicable *at all* to the case of South West Africa". In that same context, Respondent characterizes our contention as involving "a unilateral imposition upon it of suggested duties which were excluded from those undertaken".

Mr. President and Members of the Court, our analysis of the historical facts does *not* lead us to agree with Respondent that South Africa was

"induced" to accept this undertaking. And the implication of the phrase "*at all*" reinforces what seems to us an implication of a *grudging* acceptance of the international responsibilities which Respondent undertook in 1920.

The Mandate itself, in its First Article, as well as in its Preamble, reminds us that the Mandate was "*conferred*"—not *imposed*—upon the Mandatory. And the Court, in its Advisory Opinion of 1950, noted that by virtue of Article 22 of the Covenant of the League of Nations, the Territory was "entrusted" to the Mandatory, rather than thrust upon it.

Indeed, the history is quite clear that the Respondent would have preferred to annex the Territory outright, and this was no secret at the time. Applicants' Memorial, at page 37 **(I)**, quotes from an article appearing in the *Cape Times* of September 18, 1920, in which the great war-time leader of South Africa, Marshal Smuts, was reported to have said: "In effect, the relations between the South West Protectorate and the Union amount to annexation in all but name."

Several instances in which the Permanent Mandates Commission expressed anxiety concerning Respondent's claims to "full sovereignty" over the Territory are noted in our Memorials at pages 38-39 **(I)** and have been referred to by Mr. Moore in his presentation. Accordingly, we can not take it as accurate to attribute to Applicants an admission that Respondent's analysis of the history of the Mandate comports with our own. Nor would we agree, in the light of this history, that Respondent's Agent is on sound ground in contending, as he did, that annexation—when viewed in the light of Respondent's historic attitudes towards the matter—is "entirely irrelevant to the instant cases". We submit that the Respondent's attitude towards the question of annexation is relevant to an understanding of the history of this Mandate.

On the contrary, Respondent's attitude towards the Mandate and its relations with, and its authority over, the Territory, is highly relevant, as I have said. It marks their approach, not only to the Territory and to the United Nations, but also to the Advisory Opinion of 1950.

When Respondent speaks in its Preliminary Objections, at page 220 **(I)**, of the "compromise" on which the Mandate was founded, it refers, and accurately so, to the clash of views which arose from the secret agreements between some of the Allied and Associated Powers made during World War I, envisaging post-war annexation of certain colonies (including the annexation by South Africa of German South West Africa) as contracted with international control of these territories under a Mandates system. My respected colleague has discussed this point.

Respondent proceeds from the point of departure of this asserted reluctant acquiescence in, or grudging acceptance of, the Mandate, in order to lead into its major contention that the Court lacks jurisdiction to adjudicate the dispute in the cases at bar because Respondent's original undertaking to submit such disputes to judicial process lapsed with the dissolution of the League for lack of tacit, or fresh, consent to the jurisdiction of this Court.

The contention is enmeshed in considerable verbiage but that seems to be the essence of the point. The contention serves Respondent as the basis for a conclusion that it owes no duty whatever to report or account to the United Nations, or to anyone else, while at the same time preserving full rights of possession and administration. The contention, which, with its extraordinary implication might be described as the

doctrine of "convenient partial lapse"—will be examined more closely at a later stage of my argument.

In the course of the Preliminary Objections, as well as in its comprehensive Oral Statements, Respondent has offered to the Court an entire argument *de novo*. That argument is addressed, in effect, not to the merits of the issues now before the Court, so much as it is to the merits of the 1950 Advisory Opinion.

Respondent's concededly difficult task is to persuade the Court to reconsider and basically revise the Advisory Opinion of 1950. The basis of this request is the proposition that if the Court in 1950 had known of certain so-called "new facts", the Court could not have reached the conclusions it did.

The Preliminary Objections of Respondent—so far as it lay within our competence to give them the most painstaking and thoughtful consideration—appear to us, with respect, to involve circular, repetitious and elusive arguments. In our Observations we attempted, again within the limits of our competence, to comprehend, reformulate, clarify and respond to, the argumentation. Moreover, we sought to do so with an economy of words.

Applicants assumed, as has indeed I think proved to be the case, that the Oral Statements would be perhaps more than usually revealing. If the Court please, the Oral Statements Applicants now respectfully submit to the Court, taken together with our written Observations, combine to reflect our best effort fully and clearly to meet Respondent's arguments as we now comprehend them, in the light of the Oral statements which Respondent's able and learned Counsel has submitted.

The scheme of that portion of Applicants' Statement, which I now have the honour to present, rests upon three, and only three, basic propositions, each headed by a roman numeral.

I. The "new facts", so called, sought to be adduced by Respondent do not justify reconsideration and revision of the 1950 Advisory Opinion.

II. The Advisory Opinion is sound and should govern the cases at bar.

III. Respondent's *de novo* argument is in conflict with the Advisory Opinion, is not sound, and should be rejected.

Mr. President, I turn now to roman numeral I, the first of the three basic propositions, which is that the new facts sought to be adduced do not justify reconsideration and revision of the 1950 Advisory Opinion.

It appears that Respondent's entire justification for asking this Court to reconsider and revise the 1950 Advisory Opinion rests upon the contention that certain so-called "new facts" of "crucial importance" —I quote—were not known to the Court in 1950 and that, if they had been—again I quote—the Court "could not possibly have arrived at" its conclusions. Hence, Respondent argues, the Opinion is unsoundly conceived and reasoned, with consequently erroneous holdings.

In the face of so unusual, if not extraordinary, a request, with so many grave and far-reaching implications, it is noteworthy that Respondent's Preliminary Objections do not introduce this vital issue until page 345 (I), following an exhaustive *de novo* argument on the merits.

So striking a reversal of the logical and, it would seem, appropriate, order of presentation might be taken to have possible significance. It is fair to comment that this manner of dealing with the matter may reflect either one or two approaches.

Respondent may have injected the "new facts contention", if I may call it that, as an afterthought, as an effort to find a cushion against the admittedly difficult and somewhat delicate task of inviting the Court to reverse a unanimous Advisory Opinion; or Respondent might have displayed a merely casual attitude toward meeting the burden of satisfying the most minimal conditions which should govern a request for revision of judicial holdings.

Nor are Respondent's reasons for invoking so drastic a judicial procedure clearly or consistently stated, even when the time comes to discuss them in its Preliminary Observations. Indeed, the reasoning is highly confused and inconsistent.

At page 345 (I) of the Preliminary Objections, Respondent notes the Court's reference to the League of Nations Resolution of 18 April 1946, which the Court viewed (together with Article 80, paragraph 1, of the United Nations Charter) as confirming the "general considerations" set forth by the Court in its Opinion, at page 136; this holding, as I say, is noted by the Respondent in the Written Observations at page 345 (I). I shall address myself to the Advisory Opinion in detail under Major Proposition II, and shall comment at that time on the significance of these same general considerations in the Court's Opinion which are in no way impugned or impaired by Respondent's contentions.

At the present stage of my statement I shall address myself directly to what I have called Respondent's "new facts contention" as a basis for revision of the Advisory Opinion.

In the Preliminary Objections, at page 345 (I), Respondent states, and I quote:

> "In what appears to have been its [that is, the Court's] crucial Reason, No. (iii), for arriving at its conclusion under consideration, the Court inferred that the League Assembly Resolution concerning Mandates, adopted on 18th April, 1946, 'presupposes that the supervisory functions exercised by the League would be taken over by the United Nations'. Thereby", continues Respondent, "the Court presumably meant that there must have been a tacit agreement to that effect between the parties to the Resolution."

Continuing to read from page 345 (I) of the Preliminary Objections:

> "Similarly, as observed above, the factors involved in the Court's Reasons Nos. (i) and (ii) were apparently relied upon towards inferring a corresponding tacit agreement on the part of United Nations Members, to the effect that Mandatories would be obliged to submit to United Nations supervision pending or failing Trusteeship or other agreement."

Still quoting Respondent's language at page 345 (I):

> "It seems quite evident that, with knowledge of certain crucially important facts that were not placed before the Court in 1950, the Court could not possibly have arrived at these conclusions by inference. Of particular importance amongst the facts and material not presented to the Court in 1950, were the following (in time sequence): ..."

That is the end of the quote at page 345 **(I)**.

The reference in Respondent's statement to so-called "crucial Reason No. (iii)" in the Court's Opinion relates back to the paragraph beginning at the bottom of page 338 **(I)** of the Preliminary Objections. If the Court will follow this flash-back, it appears in a sequence of four paragraphs, beginning at page 338—that is, "crucial Reason No. (iii)" appears.

As the Court will observe from a reading of page 338 of the Preliminary Objections, Respondent introduces these four paragraphs with the comment that the Court itself characterized them as "decisive reasons".

In purporting to summarize these reasons, it will be noted that the first so-called "decisive reason" referred to by the Respondent in fact is a summary of an entire paragraph on page 136 of the Advisory Opinion embodying five important sentences to which I have referred, and which the Court on the same page describes as "general considerations".

Respondent's second "decisive reason" attributed to the Court—I refer still to page 338 **(I)** of the Preliminary Objections—the second "decisive reason" as summarized by the Respondent at that page, refers to the Court's interpretation of Article 80, paragraph 1, as confirming these general considerations which appear in the full paragraph on page 136.

The third so-called "decisive reason" attributed to the Court by Respondent purports to summarize the paragraph of the Advisory Opinion at page 137 relating to the Resolution of the League of 18 April 1946, which the Court said gave a view corresponding to that of Article 80, paragraph 1. Respondent underscores the comment by the Court that this Resolution, that is, the 18 April Resolution, "presupposes that the supervisory functions exercised by the League would be taken over by the United Nations". This, then, I think, is a fair analysis of the "decisive reasons" as presented and summarized by Respondent at page 338 **(I)** of the Preliminary Objections.

Reverting now to the contention of Respondent on page 345 **(I)** which I quoted earlier, the Respondent says as follows, at page 345—I repeat: "... with knowledge of certain crucially important facts that were not placed before the Court in 1950, the Court could not possibly have arrived at" the conclusions derived from these decisive reasons set forth at page 338. Respondent then goes on to say: "Of particular importance amongst the facts and material not presented to the Court in 1950...", and then Respondent lists four items; these are to be found on pages 345-346 of the Preliminary Objections.

It is therefore entirely on the foundation of this contention that Respondent requests the Court to reconsider and reverse its holdings in the Advisory Opinion of 1950, wherein the Court held that Respondent remained under the obligation of international accountability, including compulsory jurisdiction of the Court, in accordance with the compromissory clause of Article 7 of the Mandate.

Mr. President and Members of the Court, it is submitted that a request of this far-reaching nature should be submitted to the closest scrutiny; the nature and the accuracy of the premises upon which the request by Respondent is laid must be examined, as well as the relevance and the weight of the material sought to be relied upon. In the light of such a scrutiny the Court should, we submit, consider whether minimal

standards of law and logic justify action by the Court so grave and far-reaching in its consequence.

Mr. President and Members of the Court. I have reached the point in which I was venturing to analyse the nature and accuracy of the premises upon which the Respondent's request for revision is laid. I should like to begin that study with a reference to pages 214 and 215 **(I)** of the Preliminary Objections of Respondent and, in particular, call the Court's attention to paragraph E on page 214. This is in the introductory material. The Court will note that at that point, which is the first mention of the "new facts contention" in the Preliminary Objections, Respondent says as follows:

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

And then, on page 215 **(I)** of the Preliminary Objections, in the last full paragraph Respondent—and I quote—says:

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

This then seems to be the basic premises upon which the request for revision of the 1950 Opinion is laid. I said a few moments ago that the subject itself was not introduced for discussion until page 345 **(I)**, after a rather exhaustive argument on the merits in connection with the First Objection.

At the bottom of page 344 of the Preliminary Objections, Respondent defines its major premise in somewhat more precise terms. It is in paragraph *(f)* on page 344:

> "When regard is had to the considerations set out in the above quotations, it is self-evident that in the absence of knowledge of certain relevant facts, a conclusion arrived at in reasoning by inference may be vitally different from what it would be if all the facts were known and considered."

As a general proposition this is, of course, self-evident.

Nevertheless, it is an entirely different thing to assert, as Respondent does in the next paragraph, at page 345 (**I**), that the Court must be presumed to have lacked knowledge as to certain facts merely on the ground that, as is asserted, such facts "*were not placed before the Court*", or, as it is also put by Respondent, were "not *presented* to the Court".

Moreover, the confusion between the two premises, that is, of what was presented to the Court and what was known to the Court, the confusion between the two premises was compounded by Respondent's Counsel in the course of his oral statement before the Court.

In the Verbatim of 2 October, at pages 33 to 34, *supra*, Counsel conceded that the contentions now advanced by Respondent are in important respects at variance or in conflict with the Advisory Opinion. Counsel then went on to say:

> "Now that is, of course, a difficulty which we have to face squarely, and we do so, Mr. President, with the greatest respect, by contending that we are now presenting to the Court certain material, factual and otherwise, of very great importance *which was not before the Court* in 1950 and which, had it been before the Court in 1950, could have made all the difference to the conclusions eventually arrived at in the majority Opinion. [Respondent's Counsel continues] We submit, therefore, that this is one of those highly exceptional cases where although the issues may now in form appear to be still the same as they were in 1950, they are in substance really different—[really] different questions for this Court to decide, because [says Counsel] the factual material to which this Court has to apply the law is different from the factual material *that was before the Court* in 1950, and I need not ask this Court to perform the invidious function of preferring its own reasoning to that of an earlier tribunal because, as I have said, in essence and in substance [because of the difference in the factual material] the issues are now different. The task to be performed by the Court is in substance a different one." *(Italics added.)*

Reverting to the same proposition two days later, learned Counsel said at the Verbatim of 4 October, at page 99, *supra*, and I quote:

> "The sole question here is, what weight is to be assigned to the previous Advisory Opinion as a matter of authority. Now clearly, if the factual material *before the Court* now was substantially the same as the factual material in 1950 when the Advisory Opinion was considered, then that alone would mean that the Advisory Opinion would be granted strong *prima facie* weight as being of precedential value as an authority, but when it is found that the question now *before the Court* is, although the same in form, very different in substance now because of the presentation of new facts, then that must affect the value that could be given to the Advisory Opinion as a matter of precedent, as a matter of authority. That is the only logical proposition that is before the Court [said Respondent]. We say it goes so far that the real question to be decided now by application of the law to the facts is in substance different from what it was in 1950, although the form of it still remains the same and, therefore, that the Advisory Opinion, has under these peculiar

> circumstances virtually no precedential weight in the present circumstances. That is our contention as we advance it and we submit that that contention remains sound whatever the reason may have been that the facts were not presented to the Court in 1950 when they might well have been presented." *(Italics added.)*

If the Court please, I should like now to turn to an examination of the four so-called "new facts" which Respondent characterizes in its Preliminary Objections, at page 345 **(I)** as I have said, as "crucially important", so crucial indeed that, if they had been "placed before the Court in 1950, the Court could not possibly have arrived" at its conclusions, and so "crucially different", that a matter of "substance" arises now which was not in effect "before the Court" in 1950 or decided by the Court. The first of these refers to what is termed "Respondent's express reservation" at the San Francisco Conference during the drafting of the Charter. That is at page 345 of the Objections.

In our Observations we pointed out that in fact Respondent had itself made explicit reference to this matter in its own written statement to the Court in 1950, at the place cited in footnote 1 on page 431 **(I)** of our written Observations.

Respondent corrected the record before our written Observations had been received. That is correct, as Respondent justly points out.

Respondent's Counsel, during his oral statement to the Court on 4 October, at page 97, *supra*, of the Verbatim, refers to the four factors listed at page 345 (I) of the Preliminary Objections. With respect to the first point, the one under discussion, Respondent's Counsel said:

> "The first one [that is the first point] is not really important—I will not deal with it for the moment—I will revert to it later."

Then he went on, as he said, to "emphasize the importance of the second, third and fourth".

As he had promised, Counsel did subsequently revert to the first point, but not until after he had completed his effort to show the importance of the other three.

When he reverted to the first point, at pages 101 to 102, *supra*, of the Verbatim record of 4 October, conceding that the Preliminary Objections were *in error in respect of the first point* and explaining how the error took place, Counsel says, at page 102, *supra*:

> "But the whole question is really unimportant ... the matter is for my purposes not important—that is why I said before I was not placing particular reliance on it because, in effect, there is implicit in the body of the statement as it is in the text at pages 25-26 [referring to the pages in the Preliminary Objections at which is quoted the text of the South African statement at San Francisco—there is implicit in the body of that statement, [says Counsel] the same as is conveyed explicitly in this further paragraph in the footnote, and I am prepared to leave the matter at that."

I have tried to say, Mr. President, that I do not understand the implications or the logic of that contention, but I fail to see how it bears upon the question of why the point had ceased to be important.

Counsel does not explain the contradiction between the Preliminary Objections, which describe Respondent's express reservation at San Francisco as "crucially important" to the Court's findings—one of the

four facts which convert the "substance" which was before the Court in 1950 to that which is before the Court today. He does not explain the contradiction between the reference in the Preliminary Objections to this as a crucially important point, and his willingness, in his oral statement, to dismiss this point as unimportant and, as he said to "leave it at that".

Inasmuch as the "new facts" comprise Respondent's entire case for a revision of the 1950 Opinion, Respondent's omission of an explanation as to how and why this point lost its "crucial significance", suggests that this change might have taken place upon Respondent's discovery that the point had, after all, been presented in 1950 to the Court. In any event, this first point is Respondent's first casualty in the campaign for revision of the Opinion.

Mr. President and Members of the Court, I have concluded my discussion of the first point by commenting that the first point is the first casualty.

I should now like to turn to the second point. This is called in the Preliminary Objections "crucially important" and Respondent's Counsel has, during the course of his oral statement, referred to these four points —including this one—as a "new fact". The Preliminary Objections, at page 345 (I), cite the second "crucially important" fact, as it is termed, which was assertedly not placed before the Court in 1950, and contend that, with the knowledge of this fact, and of course the other three as well, in Respondent's words, the Court "could not possibly have arrived" at its conclusions.

Now this second new fact, Mr. President, concerns the rejection by the Preparatory Commission at London of its Executive Committee's proposal for a temporary trusteeship committee. Respondent comments, at page 345 (I) of the Preliminary Objections, that such action, and I quote, "negatives a tacit intention on the part of the United Nations that such functions would be transferred or assumed". It will be noted that this comment does not relate to the 18 April Resolution of the League of Nations but to the asserted lack of "tacit intention" on the part of the *United Nations* to assume the functions.

With respect to the second so-called new fact, Respondent is in error in two major respects. In the first place, the point was indeed explicitly presented to the Court in 1950. Secondly, the true significance of the action taken likewise was explicitly presented to the Court in 1950.

Mr. President, one of those who made statements before this honourable Court in 1950 was the late, and greatly respected, Dr. Ivan S. Kerno, the legal officer of the United Nations. Appearing before the Court on 16 May 1950 as representative of the Secretary-General of the United Nations, he made a statement, the first part of which was delivered in French, the second part in English. With your leave, Mr. President, in view of my regrettably faulty command of the French language, may I, through you, Sir, request the Court's interpreter to read to the Court, in the language in which it was spoken, the passage in which Dr. Kerno discusses this point? I refer to the first full paragraph at page 161 of the Volume of *Pleadings, Oral Arguments and Documents* on the International Status of South West Africa and the Advisory Opinion of 11 July 1950. With the President's permission, could the interpreter read that passage, in its original text, as delivered to the Court?

[Read by the French interpreter]

"La Commission préparatoire, où se trouvaient représentés tous les Membres des Nations Unies, se réunit à Londres, en novembre 1945, dès l'entrée en vigueur de la Charte. Elle ne retint pas la proposition tendant à créer un comité temporaire de tutelle en raison des objections d'ordre constitutionnel exprimées par certains de ses membres et de la crainte qui fut formulée que l'établissement d'un organe temporaire n'ait pour effet, non pas de hâter, mais au contraire de retarder la constitution du Conseil de Tutelle. La Commission préparatoire décida donc de présenter à l'examen de l'Assemblée générale un projet de résolution qui soulignait les inconvénients d'un délai de l'entrée en vigueur du régime international de tutelle que l'Organisation des Nations Unies avait pour tâche d'établir. Le projet déclarait que, des trois catégories de territoires auxquels le régime de tutelle pouvait s'appliquer en vertu de l'article 77 de la Charte, seuls les territoires sous mandat pouvaient être définis avec exactitude. En conséquence, la Commission préparatoire recommandait que l'Assemblée générale adresse un appel aux États administrant des territoires en vertu d'un mandat de la Société des Nations, afin que ceux-ci prennent, de concert avec les autres États directement intéressés, les mesures nécessaires pour la mise rapide en application de l'article 79 de la Charte tendant à la conclusion d'accords de tutelle pour chacun des territories à placer sous ce régime."

["The Preparatory Commission on which all the Members of the United Nations were represented, met in London in November 1945 as soon as the Charter came into force. It did not accept the proposal for the establishment of a temporary trusteeship committee in view of the objections of a constitutional nature expressed by some of its members and of the fear expressed that the creation of a temporary organ might have the effect of delaying rather than of expediting the constitution of the Trusteeship Council. The Preparatory Commission accordingly decided to submit for the consideration of the General Assembly a draft resolution which emphasized the undesirable consequences of delay in putting into effect the system of International Trusteeship, which it was the duty of the United Nations to establish. The draft stated that of the three categories of territories to which the Trusteeship System could be applied under Article 77 of the Charter, only Mandated Territories could be defined with certainty. Consequently the Preparatory Commission recommended that the General Assembly should call on the States administering Territories under League of Nations Mandate to undertake practical steps, in concert with the other States directly concerned, for the early implementation of Article 79 of the Charter with a view to the conclusion of agreements on the terms of trusteeship for each territory to be placed under the Trusteeship System."]

Mr. President, Dr. Kerno, representing the Secretary-General of the United Nations, brought this matter explicitly to the attention of the Court, as appears from the statement just read, and he did so in the course of an exposé of an argument before the Court in which he was submitting, and with which argument the Court agreed, that the United Nations had assumed the supervisory functions of the League of Nations in this respect.

The fact that the action taken by the Preparatory Commission was explicitly mentioned at the 1950 proceedings, might, indeed, produce the same chemical reaction on Respondent's part which neutralized the significance of the first crucial point when it was discovered that it had been introduced.

I turn now to Respondent's third alleged "new fact".

During the discussion in the First Committee of the League of Nations Assembly, on 9 April 1946, of the main draft resolution concerning assumption by the United Nations of functions and powers of the League, the representative of China announced that he desired to submit a resolution:

> "... recommending that the Mandatory powers should continue to submit annual reports on Mandated territories to the United Nations, and that they should agree to inspection by the latter, pending constitution of the Trusteeship Council".

This was from the Minutes of the First Committee at page 76. The Chairman, however, ruled that this was out of order at that particular stage of the proceedings.

Three points should be noted with regard to Respondent's contention with regard to this third point, which now moves up to the position of the first "new fact".

In the first place, the so-called "Chinese proposal" was never introduced or voted upon. All that happened in this respect was that the delegate expressed a wish to make such a proposal.

In its Preliminary Objections, at page 253 **(I)**, Respondent states:

> "Dr. Liang [the representative of China] wished to propose for discussion the following draft resolution, which he read out:"

Then Respondent quotes the text of a draft resolution, but without giving any citation to any document in which the resolution appears. If the Court will refer to page 253 **(I)** it will note that at the end of the text of the draft resolution which the Chinese delegate expressed a wish to introduce there is no citation to a document which one may consult to examine the text of the resolution itself. On a point to which Respondent seeks to attach such crucial significance, and one, indeed, of only two points left which might be called new facts, it is surely relevant to enquire why no such citation is made. This is not intended, of course, in any way to cast the slightest doubt upon the veracity or credibility of the assurance that the text was read out. We are prepared to accept that, of course. However, the text is only before the Court on the authority of the Preliminary Objections and the point, I submit, is that a matter to which such crucial importance is assertedly attached and at which the accuracy of documentation is assertedly at the *core* of the matter, that this might well have been dealt with in a *most* punctilious manner. This, indeed, seems to be no more or less than is the clear intent of Articles 43 and 62 of the Rules of Procedure of the Court. In particular, I refer the Court to the second paragraph of Article 62, which provides:

> "The Preliminary Objections shall set out the facts, and the law on which the Objection is based, the submissions and a list of the documents in support. These documents shall be attached. It shall mention any evidence which the Party may desire to produce."

No such document is attached to the Preliminary Objections, so far as we have been made aware, in which appears the text of the draft resolution quoted by the Respondent, nor, it must be confessed, have we found any published, or publicly available, document containing such a text. It is not in the Minutes of Meeting as published.

[Public hearing of 16 October 1962, morning]

May it please the Court. At the close of my statement yesterday afternoon I had been speaking of Respondent's third alleged new fact. This relates to Respondent's contention that, if the Court had known of certain transactions which were alleged to have taken place during the discussion in the First Committee of the League of Nations Assembly on 9 April 1946, the Court could not possibly have reached its conclusions regarding Respondent's international obligations. I had pointed out that the text of the draft resolution, which the Chinese Delegate at the League of Nations Assembly expressed a wish to propose, that the text of the resolution is quoted at page 253 (I) of the Preliminary Objections without citation. Respondent, at pages 345 to 346 of the Preliminary Objections, asserts that the so-called original Chinese proposal—and I quote the sentence beginning at the bottom of page 345 of the Preliminary Objections—"had to be withdrawn because it became plain that certain of the parties would not agree thereto". There is no specification as to who the "certain parties" might have been. And again, in this context, we find no citation in the Preliminary Objections to this highly charged sentence to which Respondent attaches sufficient importance to underscore. In the sentence immediately following the quoted sentence, that is that the resolution draft had to be withdrawn because it became plain that certain parties would not agree thereto, in a sentence immediately following Respondent draws an important inference from this unsupported statement:

> "Hence this history by itself renders plain that there was no room for a tacit intention as inferred by the Court; and together with the other factors dealt with in paragraph 32 *(d)* and *(e)* above, it shows that the tacit understanding was the reverse, *viz.* that pending 'other arrangements' there would be no obligation to report and account."

I have just quoted from the Preliminary Objections at page 346.

We thus find here yet another regrettable instance of the lack of documentation of a fact, or in this case an important inference of fact, as to the reason for the withdrawal of the proposal, which is highly relevant indeed to the conclusion drawn by the Respondent as to the so-called lack of "tacit consent". The omission of any citation to support the asserted reason for the withdrawal of the Chinese draft proposal, which as I shall show in a moment is a misnomer because the resolution was never proposed and therefore was not withdrawn, the asserted reason for the so-called withdrawal of the Chinese draft proposal is all the more regrettable because there is serious reason to doubt the accuracy of the statement so far as anything goes which appears in the record.

The records of the sessions of the First Committee of the Twenty-first Session of the League of Nations at which the events in question here took place are in the documentation and these records merit attention.

They show that on 12 April 1946, three days after the Chinese Delegate had expressed a wish to introduce a draft proposal and had been ruled out of order, he introduced another draft resolution and this became the resolution of 18 April 1946. The Committee Minutes state:

> "Dr. Lone Liang (China) recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the transfer of functions from the League of Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandate system, but the functions of the League in that respect were not transferred automatically to the United Nations. [Dr. Liang continued:] The Assembly should therefore take steps to secure the continued application of the principles of the mandate system. As Professor Bailey [who, of course was the Rapporteur of the Committee] had pointed out to the Assembly on the previous day, the League would wish to be assured as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates. [And the Chinese Delegate continued:]
>
> It was gratifying to the Chinese Delegation, as representing a country which had always stood for the principles of trusteeship, that all Mandatory Powers had announced their intention to administer the territories under their control in accordance with their obligations under the mandate system until other arrangements were agreed upon. It was hoped that the future arrangements to be made with regard to those territories would apply in full the principle of trusteeship underlying the mandate system.
>
> The Chinese Delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in concrete form and the position of the League clarified."

This is from page 78 of the Minutes.

I call the Court's attention to the fact that the Minutes reflect the gratification and the pleasure expressed by the Chinese Delegate in tabling the draft resolution which was accepted by the Assembly. The implication of Respondent's position is that the Chinese Delegate under threat, or pressure, or inference that the resolution he originally expressed a wish to propose could not be adopted, that the Chinese Delegate thereupon retreated both from position and, if the Court please, from principle. And I submit that the Chinese Delegate would not have expressed his gratification and his pleasure in submitting the draft proposal which was accepted by the Assembly if he had beaten a retreat from the principle which he was expounding. In any event, my inference, which is purely an inference, seems more probable than the contrary inference drawn by Respondent and unsupported in the record.

But the Minutes of the First Committee go on, and they show further that the Chinese draft was seconded by the Delegate of the United Kingdom, who is reported as saying:

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

The reference to "unanimity" might, indeed, refer to the fact that under the procedures of the League the Delegate of South Africa might have cast a veto. That is possible. I am referring, however, to the Minutes of the Meeting which are before the Court and the inferences to be drawn from the Minutes in so far as they show actions taken and statements made at the sessions in question.

This report of the British Delegate's seconding statement is quoted in Respondent's Preliminary Objections at page 254 (I), I cite that merely for the convenience of the Court. No statements on the part of any other delegations at the session of the Committee appear in the Minutes of the Committee. There is nothing whatever to justify Respondent's inference that the Chinese Delegate had—I quote again—"withdrawn" an earlier draft proposal because it had become plain that certain of the parties would not agree to it, and as I have pointed out, the use of the word "withdrawn" is inaccurate inasmuch as the proposal had never been introduced.

It would seem that the "crucial importance", as the Respondent describes it, of Respondent's third alleged new fact hinges upon a carelessly worded, undocumented, unsupported and probably inaccurate inference as to why the Chinese Delegate in fact decided not to consummate his wish to propose a resolution. In concluding my comments on the third so-called new fact, I must point out also that Dr. Steyn, who was Respondent's able Counsel in 1950, made full written and oral arguments in these proceedings. It seems incredible that he should have been ignorant of what Respondent now describes as a "crucially important" fact in the history of the Mandate. And if he was aware of the matter, it seems reasonable to assume that he did not regard it as of crucial importance at all; in fact, not even of sufficient importance to mention it in the course of his extended pleadings and arguments.

Before turning now to the fourth, and final, new fact, I think it may be appropriate to refer to Counsel's comment, in the course of his oral statement, that our Observations make an ambiguous comment about this matter. He referred, and I think quite properly called the Court's attention, to the sentence beginning at the bottom of page 431 (I) in our Observations in which we state that:

> "The facts concerning the Chinese proposal were before the Court *in 1950, in the Written Statement of the United States of America.*"

I regret if this form of words, this formulation, is misleading. In extenuation I should like to point out that on the same page of the Observations, page 431, we quote in full the excerpt from the written Statement of the United States to which we refer so that its actual signification is readily ascertainable by inspection of the text.

I turn now to the fourth new fact referred to at page 346 (I) of the Preliminary Objections: Respondent there describes two sets of materials in a rather confusing context. One relates to the report of the United Nations Special Committee on Palestine. The other refers to what Respondent describes as "statements by representatives of various States during various debates at the United Nations". I refer to page 346 of the Preliminary Objections. More specifically, Respondent refers to statements, or excerpts from statements, set out in the Preliminary Objections at pages 394-397 or, in accordance with Respondent's method

of citation, Sections 34 *(b)* to 34 *(f)*. These are at pages 334-337 **(I)** of the Preliminary Objections.

Turning to the statements cited at pages 334-337, we find that paragraphs *(b)* and *(c)* relate to the Report on Palestine itself, and this will be considered in a few moments. The only other three references to the so-called practice of States in this context occur in paragraphs *(d)*, *(e)* and *(f)* on pages 334-337.

Paragraph *(d)* is a portion of a statement by New Zealand made on 22 November 1946, in a debate concerning a draft trusteeship agreement for Western Samoa. At the end of the quotation, incidentally, on page 336, Respondent erroneously cites footnote 1, whereas the reference should be to footnote 3 of that page.

Now, paragraph *(e)* refers to a statement by the Soviet Delegate to the United Nations Security Council on 2 April 1947, during a debate on the Japanese Mandates.

And paragraph *(f)* refers to a statement made by the United States representative on 19 March 1948 in the Security Council during a debate on Palestine.

I call the Court's attention to these paragraphs which are, as I say, under the heading "Practice of States", which is the heading of Section 34, on page 334 **(I)** of the Objections.

Mr. President and Members of the Court, the references to the statements by the Delegate of New Zealand in 1946, of the Soviet Delegate in 1947, and the United States Delegate in 1948, represent therefore three neatly spaced examples of statements made by Delegations during a period of some two and a half years. These references, plus the Report of the Special Committee on Palestine, comprise the whole of the fourth "crucially important" fact, as it is called. Respondent, at page 346 **(I)** of its Preliminary Objections contends as follows:

> "These comments and statements show most unmistakably a general (or at least a very widespread) understanding amongst Members of the United Nations that no supervisory functions regarding Mandates (not converted into Trusteeships) had been taken over, and thus refute any suggestion of a general tacit intention to the contrary.
>
> Had the above facts been known to the Court in 1950, it seems inconceivable that the Court could have arrived at its conclusion regarding an obligation on Respondent's part to submit to United Nations supervision." (P. 346 **(I)**.)

It is fair to add that Respondent's reference to the "above facts", in this quotation, refers to all four sets of "new facts," not merely to the fourth fact. As we have seen, however, the first two actually were presented to the Court explicitly and have dropped out of competition, so to speak.

It is difficult to deal at length with Respondent's contention regarding this fourth "new fact" without dignifying it beyond its desserts.

In the first place, Respondent's contention with regard to the importance of this fourth point ignores the weight which was given by the Court in its Advisory Opinion to the significance of Article 80 (1), as confirming the intent of the authors of the Charter of the United Nations that there should be a continuance of United Nations supervision over Mandates. That is, of course, the explicit inter-

pretation of the Court in its Advisory Opinion. Respondent, in its argument, does not even consider it relevant enough to refer to Article 80 (1) in this connection.

Secondly, the premise upon which Respondent lays its request for revision of the 1950 Advisory Opinion, in this respect, is that the Court misconstrued the force and effect of the 18 April 1946 Resolution of the League of Nations General Assembly. This seems to be the key proposition, although it is not expressly and clearly stated as such in the Preliminary Objections. To the extent that it relies upon evidence to show that the Court misconstrued the 18 April 1946 Resolution of the League, it does not appear how statements made one or two years later in the United Nations General Assembly could help overcome the clear meaning of statements made contemporaneously with the League Resolution of 18 April 1946.

Thirdly, the contention that the United States policies supported Respondent's thesis verges on the ironic.

The history of Article 80 (1) is replete with evidence—as was demonstrated by my colleague, Mr. Moore, in his statement before the Court yesterday, which appears at pages 269-270, *supra*, of the Verbatim —is replete with evidence of the leadership taken by the United States in the formulation, the steering and the adoption of Article 80 (1). The clause, as he pointed out, was originally and significantly entitled the "conservatory clause", and I will not trespass upon the Court's time to repeat the history which he sets forth at pages 269-270, *supra*, of the transcript. All this occurred—all this history occurred—with regard to Article 80 (1) at the time of the adoption of the Charter in San Francisco; it was part of the transactions from which the Charter itself resulted. Respondent has contended elsewhere that contemporary views and acts are of higher probative value than are those of a period which is not contemporaneous. The logic of Respondent's contention however is not applied to this situation and does not preclude Respondent from citing, among crucially important new facts, a statement made by the representative of the United States some three years after the San Francisco conference, in a highly politically charged debate on Palestine. Moreover, if it is appropriate for Respondent to cite a statement made by the United States delegation three years after its leadership at San Francisco in the adoption of the "conservatory clause"—if that bears upon the interpretation to be placed upon that event—it is appropriate for us to refer to the fact that in the Proceedings in 1950 before this Court, in connection with the Advisory Opinion, the United States took a clear and carefully reasoned decision on the same matter, a position which was wholly consistent with the United States policies emphasized at San Francisco in 1945. It would seem that the implication sought to be drawn from the statement of the United States delegation in 1947, in connection with the Palestine debate, is not borne out by the historic record.

With regard to the Palestine Committee Report itself, the United States written Statement stated explicitly:

> "This Committee [the Palestine Committee] reported to the Second Regular Session of the Assembly in the fall of 1947 and on the basis of its report the General Assembly adopted Resolution 109 (III) containing recommendations concerning the future of Palestine."

This is quoted from the United States statement before this Court. It is therefore obvious that the Court's attention was drawn to the Report itself. In fairness to Respondent's contention, I would point out that Respondent has nowhere contended that the Palestine Report itself was not called to the Court's attention during the 1950 proceedings, nor that it was not directly referred to. Respondent's narrower and, I submit, much more questionable thesis, is that because specified portions of the Report were not placed before the Court or presented to the Court, in Respondent's submission the Court must be presumed to have reached its conclusion in the absence of knowledge of these facts. These are two wholly different propositions.

Moreover, the construction Respondent places upon the Palestine Report is itself open to the *most* serious question. It would be unnecessary, I believe, to dwell upon the highly charged and widely publicized debates of the United Nations and its committees regarding the Palestine question in 1947 and 1948, these are not really relevant to the case at bar. But in the climate of controversy at that time it was not surprising that the Report of the Palestine Committee itself *did* contain vague and contradictory language regarding the assumption by the United Nations of supervisory powers over the Mandate. Thus, the Committee commented:

> "*The essential feature* of the Mandates System was that it gave an international status to the mandated territories. This involved a *positive element of international responsibility*, for the mandated territories and of international accountability to the Council of the League of Nations."

This is quoted from the Committee report at p. 335 (I) of the Preliminary Objections. Respondent underscores the last clause, that is to say, the reference to "international accountability to the Council of the League of Nations". Respondent does not underscore references to the phrase "the essential feature" or to the "positive element of international responsibility".

The Palestine Committee recommended that Palestine be granted independence and that, in the interim, the United Nations should supervise the Mandate. The Committee was obviously without the slightest doubt concerning the competence of the United Nations to exercise supervision over Mandates. The Committee quite understandably, however, did not regard this as a satisfactory *permanent* solution; United Nations Members today take precisely the same view with regard to the Mandate for South West Africa.

Mr. President and Members of the Court, I should like to express regret if my rather detailed analysis of the "new facts" has overwhelmed the Court with detail. I have now concluded the examination of the precise elements involved in the four new facts.

I should now like, with the Court's permission, to come to some considerations which seem to flow from the surgical analysis to which I have subjected these facts in view of their admitted importance to the quest for a reopening of the Court's Opinion of 1950.

Respondent's contention, it seems to us, comes to this. If the Court in 1950 had known of these excerpts, or facts, or material, and there is no evidence to support the pure speculation that it did not know of them, although it is clear that two of them were not specifically referred

to, if, as Respondent contends, the Court did have knowledge of those facts, the Court could not possibly have interpreted the 18 April 1946 Resolution as confirming, along with Article 80, paragraph 1, of the United Nations Charter, the decisive reasons set out by the Court at page 136 of its Opinion for concluding that the supervisory functions over this Mandate are to be exercised by the United Nations. That is their contention.

It is difficult, we submit, to take such a contention seriously. Public records, many of which were included in the documentation of the proceedings, are replete with instances of contradictory and confusing expressions of view, at different times and in different contexts, by Members of the United Nations, sometimes by the same Member at different times. Respondent has selected from among these several which were not documented in 1950 by the Secretary-General, in application of Article 65 of the Statute, in submitting documentation to the Court. These carefully selected excerpts are labelled "new facts", and the Court is asked to reverse its Advisory Opinion on their account.

The fact is that in the period 1947 to 1949 strenuous efforts were being made by United Nations Members to induce the Respondent to follow what this Court, in the Advisory Opinion; called—and I quote—the "normal course indicated by the Charter".

During this period vague, inconsistent and contradictory views were expressed on the subject of United Nations supervision over the unconverted Mandates. Mr. President, I have borrowed these adjectives, "vague", "inconsistent", and "contradictory" from Respondent's Counsel, who thus described the same matter on 5 October at page 133, *supra*.

Of course, it was precisely because of the confused, vague and contradictory, and often shifting, statements by Members of the United Nations, that the Members, through the General Assembly, requested this Court for its Advisory Opinion. And now Respondent relies upon that very confusion and vagueness to induce the Court to reverse its Opinion.

It is respectfully submitted that Respondent's contention is a parody of logic and history, not without, perhaps, some overtones of cynicism.

We feel, therefore, and respectfully submit, that Respondent has not laid a basis for requesting the Court to revise the 1950 Advisory Opinion.

Counsel for Respondent, in his oral statement before the Court at page 106, *supra*, commented on the discussion in the Applicants' Observations in which we attempt to demonstrate that the alleged "new facts" are neither new, nor crucial. Respondent contended at this point in his argument that we had not dealt, "as a matter of merit" as he said, with Respondent's contention that these facts are of crucial importance.

Mr. President, I hope that the Court's reading of our Observations, together with our oral statements, may persuade the Court that we have indeed attempted, to the best of our ability, to deal "as a matter of merit" with Respondent's contention in this respect and to show that its contention is without merit.

Scrutiny of Respondent's method of presenting and analyzing the "new facts", and the analysis of the facts themselves—and this is the main significance, I think, of the point—clearly reveals Respondent's basic strategy in supporting its submissions to this honourable Court.

In the case of each "new fact", the alleged element of "crucial importance" assigned is that of so-called "tacit agreement" or "consent" as it is alternatively called.

The first fact, laid in 1945, was intended—abortively, because it was actually before the Court—to show that Respondent did not acquiesce in "supervision by the United Nations" in 1945. I quote from the Preliminary Objections at page 345 (I).

The second fact, laid in 1946, was intended to show that there was no such "tacit intention" on the part of the United Nations. This second fact also has aborted, because it was before the Court, presented by Dr. Kerno.

The third fact, also laid in 1946, is offered as showing that there was no "tacit intention" on the part of the League of Nations to transfer responsibility. This relates to the interpretation of the 18 April 1946 Resolution. At page 346 (I) Respondent imputes to the Court—I think erroneously—the intention to infer "tacit consent", as the language of the Respondent goes. Respondent speaks of "a tacit consent inferred by the Court". The Court inferred no such "tacit consent", in my reading of the Opinion.

And the fourth fact, laid in 1947, is presented as refuting "any suggestion of a general tacit agreement", by which Respondent means a "general understanding amongst Members of the United Nations" that the Charter had intended the Organization to supervise Mandates until or unless they were converted into trusteeships or granted independence.

Now, the fact is that none of the four decisive reasons found in the Court's Opinion, and they are termed this by Respondent in its Preliminary Objections, none of the decisive reasons underlying the Opinion of 1950 rests on a premise of "tacit consent", whether on the part of the Respondent, the League of Nations, or the United Nations. The "general considerations", as the Court itself describes them in its Advisory Opinion at page 136, which in fact underlay the Court's conclusion, proceeded from the very legal nature and legal consequences of the Mandate institution itself. These "general considerations", I repeat they are to be found on page 136 of the Court's Opinion, these "general considerations" involved the most basic concepts of the authors of the Covenant and the authors of the United Nations Charter. These "general considerations", as the Court further said, "are (and I quote) confirmed by Article 80, paragraph 1".

Respondent's abortive first "new fact"—the reservation made by Respondent at San Francisco, could, at best, be relevant only to a construction of the Charter in general and to Article 80, paragraph 1, in particular. Precisely the same thing is true of the second abortive "new fact", which relates to the proceedings of the United Nations Preparatory Commission and purports to bear upon the construction of the Charter and the intentions of the authors of the Charter on this matter.

The third incident, or fact—that is the incident of the Chinese proposed draft resolution—could not possibly or reasonably, be taken to bear upon the intention of the authors of the Covenant of the League, as manifested clearly in Article 22 twenty-five years earlier.

And the fourth fact—the so-called practice or views of United Nations Members—is another variation on the theme of the first two,

because this relates again to the intention of the United Nations Charter in general, and Article 80, paragraph 1, in particular.

Mr. President, and Members of the Court, in the light of this analysis, the basic strategy of Respondent's entire argument is fully revealed. It is a strategy which, indeed, marks and—I respectfully suggest—confuses its entire argument. Respondent cannot hope to demonstrate that if the Court had known of these facts—as it actually did in the case of the first two of them—it could not possibly have construed Article 22 of the Covenant, the Mandate instrument, and the United Nations Charter the way it did. One has only to look at the "general considerations" adduced by the Court at page 136 of its Opinion to establish the validity of that proposition.

Respondent's entire effort in this proceeding, and this, Mr. President, is why I have insistently attempted to submit these facts to surgical analysis, the Respondent's entire effort is directed at assailing and repudiating the validity of the Court's rationale, in the guise of re-interpreting and, I believe, distorting in the process, that rationale. Respondent's strategy, I think, is exposed. Respondent does not interpret the "new facts" in a manner consistent with the true significance of the Court's reasoning, or "general considerations". The Respondent, on the contrary, interprets, or rather misinterprets, the Court's reasoning so as to give a false significance to the "new facts".

This will appear even more clearly, I submit, from an analysis of the Court's Opinion itself, to which I turn under my second major proposition, and of the Respondent's contentions on the merits, which is my third proposition. But before turning to the second and third propositions, with the Court's permission, I should like to make one final comment with regard to the "new facts" contention as I have called it, as well as its method of presentation to the Court.

Article 61, paragraph 1, of the Statute of the Court states—and this was quoted by learned Counsel in his oral argument:

> "An application for revision of a judgment ['a judgment now in contrast with an Advisory Opinion' he said] may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

That is the quotation of Article 61, paragraph 1. In our submission there is no reason in justice or logic to ignore, in the case of request for revision, and in this case a reversal, of the basic holdings of an Advisory Opinion, there is no reason in logic or justice to ignore even the most minimal standards laid down in Article 61 of the Statute of the Court, which—as Counsel himself conceded in his oral statement of 4 October, at page 100, *supra*,—conform to the generally accepted principles favouring the stability of judgments.

Article 68 of the Statute of the Court provides that the Court, in the exercise of its advisory functions:

> "shall be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable".

Article 82 of the Rules of Procedure similarly provides that the Court:

> "shall also be guided by the provisions of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable".

The facts which Respondent failed to present to the Court in 1950 all related to matters of public knowledge, all were contained in public documents, all these documents were themselves referred to in written or oral statements, even though excerpts referred to by Respondent were not, in some cases, precisely quoted, or quoted at all.

Respondent has not contended, and cannot plausibly assert, that it was ignorant in 1950 of the facts now sought to be adduced. Nothing Respondent has contended even implies that it was ignorant of these facts, so far as I have been able to discover in the record. Respondent has, moreover, not asserted, so far as I have seen, that such ignorance, if it existed, was not due to negligence. Indeed, given Dr. Steyn's conceded competence, the probability is that his failure to make explicit reference to such facts—and this relates only to the last three—reflected his calculation that they were of relative unimportance to the scheme of his argument.

Nor are the facts themselves of "such a character as to lay the case open to revision", in the words of paragraph 2 of Article 61 of the Statute. Their unsubstantial nature has, I hope, been manifest in the course of my oral statement.

It is submitted accordingly, Mr. President and Members of the Court, that the Court should give due weight to the fact that Respondent has failed to advance any reason whatever for not meeting even the most minimal requirements of Article 61 which Respondent, itself, concedes, embody principles widely accepted in municipal legal systems.

Respondent's request for reconsideration and revision of the 1950 Advisory Opinion should, it is submitted, be rejected.

Mr. President, and Members of the Court, by referring to Article 61 of the Statute and the relevant Rules of the Court, I would like to make clear that it is not submitted that the Court should, or indeed, could appropriately, apply literally and in text these Articles and these Rules as such, in the case of Advisory Opinions. I am referring specifically to the minimal standards which the Article in question embodies, and which standards conform to the generally accepted principles of law. For it remains true, as Counsel himself has conceded during the course of his argument that, but for these new facts, the Court's Opinion would be granted strong *prima facie* weight as being of precedential value as an authority.

In turning now to my second major proposition, the Advisory Opinion we submit is sound and should govern the case at Bar. Our second major proposition is, of course, based on the assumption that if, contrary to our submission, the Court should decide to reconsider the Advisory Opinion of 1950, then an analysis of such an Opinion is highly relevant to an appraisal of Respondent's *de novo* contentions. I have submitted that an analysis of the Advisory Opinion is indeed also pertinent to an appraisal of Respondent's new fact contention as well, although I submit, Mr. President, it would not be necessary on that base alone to go into an extensive analysis which I shall venture to undertake of the

Advisory Opinion of 1950. If it is an invidious task for Respondent's Counsel to challenge the Merits of the 1950 Advisory Opinion, as indeed he must seek to do, it is perhaps a presumption on my part to attempt, if I may say, to defend or expound the Advisory Opinion of 1950; I am aware of the delicacy of the position in that respect, and yet the 1950 Advisory Opinion is, and must be, the yardstick by which Respondent's contentions, on their merits as well as with respect to the new facts, must be measured.

As was expressed earlier in my argument, in my oral statement, we do not think that a *de novo* argument is really called for in this case. Therefore, in turning to an analysis of the Advisory Opinion, I would like to state emphatically, though I do not do so with any implication, that the Opinion requires restatement or clarification but we think it is clear, sound, and that it means what it says.

Turning now to the Opinion itself, we take it that the Advisory Opinion lays down as the law of the case that the machinery for implementation of the Mandate, together with all its other substantive rights and obligations, survived the dissolution of the League. The holding in no way distinguishes between the Mandatory's rights and its international duties. On this aspect only was the dissent partially at variance with the majority opinion. The dissenting Judges found some difficulty with the notion that continued administrative supervision might survive a defunct administrative organ in this context, the majority found no such difficulty. The learned Judges in the dissent nonetheless joined the full Court in upholding the survival of compulsory jurisdiction, where the same problem, of course, did not arise since the Court has never been defunct.

The Court rejected Respondent's contention, first made to the Court in 1950 and now repeated in different form, that the Mandate as a whole had lapsed. The Court found that the contention misconceived—I quote from page 132 of the Opinion—"the legal situation created by Article 22 of the Covenant". The reference to Article 22 is highly significant inasmuch as that Article embodies the concepts both of sacred trust of civilization, from which substantive rights and obligations are derived in the Mandate, and the concept of securities for performance of the trust, from which obligations to account and report, as well as to submit disputes for adjudication, are derived in the Mandate. Analyzing the legal nature of the Mandate, the Court considered, and I quote, that a "new international institution" had been created, "the objects of which far exceeded that of contractual relations regulated by national law". "It is not possible", said the Court at page 132, "to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law."

With respect both to the machinery for implementation and substantive rights and obligations, the Court (at pages 132-133) referred to the "international rules regulating the Mandate", which "constituted an international status for the Territory". The functions entrusted to the Mandatory possessed an "essentially international character", said the Court, as appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate, the exercise of these functions was subjected to the supervision of the Council of the League of Nations. This fact of subjection is what the Court took as showing the essentially international character of the Mandate institution. Respondent, as we

shall see, I believe distorts the meaning of this by assuming or contending that this sentence in the Court's opinion in effect means that it was only the Council of the League that was entitled to supervision.

It is to be noted that the Court, by this language (at page 133), made clear that the functions, as they are called, comprise both the international machinery for implementation and the substantive rights and unilateral obligations of the Mandatory. If this were not so, the Court's reference to Article 22 would be meaningless, since it contains both sides of the equation.

In confirmation of the fact that the "essentially international character" of these functions included the machinery for implementation the Court, in the same context (at page 133) refers to Article 7 of the Mandate, relating to submission of disputes to judicial process. This reference to Article 7 precedes the subsequent mention of Article 7 in connection with the Court's holding that Article 7 has survived. At this page of the Opinion (page 133), the Court refers to Article 7 of the Mandate as confirming the fact that these functions had an essentially international character. Going on from its finding that the international rules regarding both substantive rights and accountability, and again I quote, "constituted an international status for the Territory", the Court said (at page 133) and, I think, reached an inescapable conclusion by saying so, with respect:

> "If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed."

This proposition, which seemed to the Court sufficiently axiomatic as a matter of justification, is not referred to so far as I have discovered on any place in Respondent's Preliminary Objections or in their oral statements. I will come to that in considering their contentions.

In order to dispel any possible doubt that by reference to the lapsing of the Mandate, the Court was speaking of international machinery for implementation as well as of unilateral rights and duties, the Court—in the very next sentence on page 133—pointed out that "to retain the rights derived from the Mandate and to deny its obligations would not be justified". Again, so far as I have been able to discover, this, I would submit, most obviously tenable proposition is not referred to or commented upon at any stage in the Preliminary Objections or in the oral statements before this Court.

The term "justified", used by a Court of law in such a context surely has a legal as well as a moral connotation, and I shall revert to this in discussing Respondent's contentions. As clearly appears from the foregoing discussion, there is no room for doubt, I submit, that the Court's phrase, "to deny the obligations", on page 133, could have no meaning other than the obligations to account and report, as well as such unilateral obligations and rights as may exist.

The Court, as I have ventured thus far to analyze the Opinion, laid down as the law of the case that the machinery for implementation, together with the substantive rights and obligations, survived the dissolution of the League. That was an explicit clear holding. The Court thereupon turned to a consideration of the two kinds of "international obligations assumed by the Union" and, for the sake of convenience, analyzed each kind separately. It is worthy of repetition to note again that, in the earlier portion of its Opinion, the Court had already concluded

that *both* kinds of obligations had survived the League's dissolution. The discussion by the Court of each of these two kinds of surviving obligations embodies and elaborates the rationale of its holding.

The first group of obligations directly related to the administration of the Territory; the second group related to the machinery for implementation (that is found at page 133 of the Advisory Opinion); the latter group of obligations was, as the Court pointed out on the same page, "closely linked to the supervision and control of the League". And it should be noted that, although the Court did not make explicit reference to the matter at this point of its Opinion, the obligation was also linked with international judicial supervision or, as I think it might more accurately be called, the duty to submit to compulsory process under the compromissory clause. This clearly appears from the Court's explicit reference to Article 7 on the same page of the Opinion, to which I have referred, that is page 133, in describing the essentially international character of the functions entrusted to the Union.

Mr. President and Members of the Court, in listening to the French translation of my comments regarding the expression used by the Court at page 133 regarding the two kinds of international obligations assumed by the Union, I did not, although with faulty French misunderstanding may have missed, I did not hear the French translation refer to the qualification I had made regarding the sentence in question. I think that it was my fault, and an unpardonable advocate's fault, in not quoting the whole sentence, and I should like to quote the whole sentence so that the English and French versions will be exactly the same. As a matter of fact I fear that what I said in my original remarks is inaccurate, or at least ambiguous. The sentence in question appears on page 133 and I read it in full:

> "These international obligations assumed by the Union of South Africa were *of two kinds*."

I had perhaps left the impression that the Court did not make it clear that they were of two kinds but I was referring to this exact quotation, and should have quoted the whole sentence. The fact is that the Court did hold specifically that the obligations were of two kinds.

Returning then to my argument. In considering the first kind of obligation, that is the obligation of administration, the Court reiterated that these obligations were of such a nature that, and I quote: "they could not be brought to an end merely because" the League of Nations had ceased to exist, as Respondent had frankly contended before the Court in 1950. I say "reiterated" in this context because the Court had earlier in its Opinion, on the preceding page, had already rejected the Respondent's contention that the Mandate had lapsed. On page 133, as a necessary corollary, the Court reiterated that the obligations were of such a nature that they could not be brought to an end merely because the League had ceased to exist.

In this context, the Court significantly, and for the first time in its Opinion, refers to Article 80, paragraph 1, of the United Nations Charter. The significance of the Court's reference to Article 80, paragraph 1, of the Charter clearly appears from the stress of phrases used by the Court, such as: "under all circumstances" and "in all respects", phrases characterizing the Article's pervasive intention to safeguard the rights, all the rights, of the inhabitants of Mandated territories.

The Court's emphasis concerning Article 80, paragraph 1, its scope and force and meaning, is reinforced by the Court's subsequent references in the Opinion to that paragraph of Article 80, particularly in the light of the context in which the subsequent references appear.

The first reference to Article 80, paragraph 1, is, as I have said, at the bottom of page 133 and relates to the group of obligations entrusted to the Respondent in Articles 2-5 of the Mandate read in the light of Article 22 of the Covenant. It is these obligations which, as the Court said, represent the very essence of the sacred trust of civilization, and the Court went on to say:

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

It was precisely this conclusion which the Court held was confirmed by Article 80, paragraph 1, of the Charter, with the striking emphasis and language to which I have referred. It is with reference to the survival of these obligations on the part of the Mandatory, together with these rights on the part of the population of the Territory, that the Court interpreted Article 80, paragraph 1.

The next reference in the Opinion to Article 80, paragraph 1, occurs at the bottom of page 136 of the Advisory Opinion. In this context of the Opinion the Court is referring to the "second group of obligations" of the Mandatory, that is to say, the obligations which "were closely linked to the supervisory functions of the League of Nations, particularly the obligation of the Union of South Africa to submit to the supervision and control of the Council of the League". That is quoted from the Opinion. The Opinion immediately thereupon, still referring of course to the second group of obligations, the machinery for implementation, the Opinion thereupon immediately answers the question which the Court itself has posed and that is whether these supervisory functions are to be exercised by the new international organization, that is the United Nations, and whether the Respondent is obliged to submit to United Nations supervision and to render annual reports to it. The Court holds, answers its own question, in the affirmative, and it holds, on the basis of reasons set forth on page 136, decisive reasons, which the Court on the same page refers to as "general considerations" as well as decisive reasons, the Court holds on this basis that the question must be answered in the affirmative and that the obligations to account and report exist and that the United Nations is to exercise them. Now these reasons, these decisive reasons, general considerations, are crucial to the Court's holding, are not in any way impaired by Respondent's "new facts" contention, as I have sought to make clear, and they are not impaired, I shall submit under the next heading, they are not impaired by the *de novo* argument made by Respondent.

The reasons, set forth at page 136 of the Opinion, the "general considerations" or "decisive reasons" as they are alternatively called by the Court, comprise a paragraph of five sentences, in substance as follows. Each is, I think, pregnant with meaning:

First, the obligation to "accept international supervision and to submit reports is an important part of the Mandates System". As a matter of fact it has been regarded generally, I think the history shows, as an *essential* part.

Secondly, the authors of the Covenant, said the Court, and I quote, "considered that the effective performance of the sacred trust of civilization by the Mandatory Powers required that the administration of Mandated territories should be subject to international supervision". Parenthetically the Court did not say that it required that they be subject to international supervision by the Council of the League of Nations, or by any other specific or designated agency. In this context the Court is talking about a "general consideration". The Covenant required that the administration of Mandated territories should be subject to international supervision.

Third sentence: "The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System."

Fourth sentence: "The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System." The insistent emphasis on the word "necessity" is significant.

Fifth and last sentence in this paragraph of general considerations, or decisive reasons I shall likewise quote in full:

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

Hence the Court, on the basis of its analysis of the legal nature of this new international institution, concluded that international supervision was an essential feature of the institution and that this had been the view of the authors of the Covenant and the authors of the Charter, and the Court goes on—and I quote from page 137:

> "These general considerations are confirmed by Article 80, paragraph 1, of the Charter",

and, says the Court, the League "gave expression to a corresponding view on 18 April 1946.

[Public hearing of 16 October 1962, afternoon]

Mr. President and Members of the Court, at the close of the morning session, I had referred to the analysis of the Court and my last remarks were that the Court, on the basis of its analysis of the legal nature of this new international institution, concluded that international supervision was an essential feature of the institution and that this had been the view of the authors of the Covenant and of the authors of the Charter, and then that the Court goes on to say (page 137):

> "These general considerations are confirmed by Article 80 (1) of the Charter and [says the Court] the League gave expression to a corresponding view in its Resolution of 18 April 1946."

It is in this context, relating to the survival of Respondent's obligations to account and report to the United Nations, that the Court makes its second reference to Article 80 (1). And in doing so, it not only holds

that Article 80 (1) confirms the reasons for the affirmative answer to the question the Court has posed itself, but that such confirmation is based upon the interpretation which the Court had already given to Article 80 (1) in its first reference to that clause. In other words, the Court, as it seems to me, incorporated by reference its interpretation of Article 80 (1) into this second reference to it, and this in the context of the survival of Respondent's obligations to account and report to the United Nations. The Court says, at the bottom of page 136, that the considerations supporting its holding with respect to the survival of Respondent's obligations to account and report are controlled by Article 80 (1) "as this clause has been interpreted above". The Court obviously is thereby construing Article 80 (1) in a sense which safeguards, for the people of Mandated territories, the right to have the protection of international judicial supervision, in the sense of compulsory jurisdiction of disputes arising under the compromissory clause.

The third reference to Article 80 (1) in the Court's Opinion appears at page 137. At this point, the Court is discussing the question whether the right of petition had survived the dissolution of the League. Beginning at the bottom of page 137, the Court held that this right "is maintained by Article 80 (1) of the Charter, *as this clause has been interpreted above*", again incorporating by reference the interpretation given to the clause in its first mention earlier in the Opinion.

It will be noted that the Court thereby attributes to Article 80 (1) the positive quality of "maintaining" the right of the inhabitants to petition to an international agency. Moreover, in exactly the same way as the Court had done in its second reference to Article 80, at page 136, which relates to continued United Nations supervision—the Court reaffirms, in the context of the right of petition, the interpretation which it had earlier given to Article 80, in such sweeping and, if I may say, striking emphasis.

Finally, the Court makes its fourth reference to Article 80 (1) in the context of the discussion of the compromissory clause of the Mandate itself, which is of course the clause at issue in the cases at bar. The precise question in issue, at this point of the Opinion, was whether Article 7 remains in force with the consequence that Respondent continues to be under an obligation to accept the compulsory jurisdiction of this Court. The Court answers the question in the affirmative, and says in doing so:

> "Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter."

That is at page 138.

These four successive references to Article 80 (1), each in a different though related context, and each based on the same interpretation of the clause, have accumulative significance in our judgment. They demonstrate, it seems to us, that the Court was defining Article 80 (1) so as to give a full scope and an enduring vitality to the "international functions" which had been entrusted to the Respondent, to the "new international institution" which had been created by Article 22 of the Covenant and the Mandate and to the "international status for the territory", which had been created by the "international rules regulating the Mandate". I have quoted each clause from the Court's Opinion.

Having thus established the confirmatory significance of Article 80 (1), the Court refers, at page 137, to what it calls the "corresponding view" expressed by the League of Nations with regard to the purposes of Article 80 (1). Specifically, the Court describes it to be the purpose of Article 80 (1) "to provide a real protection" for the rights of the people of Mandated territory, and concludes that those rights could not "be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ". That is the way the Court has construed Article 80 (1).

Now, the Court speaks of a "corresponding view" embodied in the 18 April 1946 Resolution. It says that that resolution, the League resolution:

> "*presupposes* that the supervisory functions exercised by the League would be taken over by the United Nations".

I think it is relevant, Mr. President, at this point, to inject a brief reference to Respondent's contention—with which I have dealt fully under the first major proposition—concerning the Respondent's argument —that if the Court had been aware in 1950 of certain so-called "new facts", the Court would have taken a different view of the 18 April Resolution and would have reached the conclusion that Respondent's obligation of international accountability terminated upon the dissolution of the League. I have, as I say, met head-on Respondent's contention in that regard, with all its grave and far-reaching implications.

With the Court's permission, I call to the attention of the Court the precise terms in which the Opinion treats of 18 April 1946 Resolution, the context in which it does so, and (as it seems to us) the inescapable inferences which are to be drawn from both the treatment and the context.

As in the case of Article 80 (1), the Court refers to this Resolution in multiple, although closely related, contexts, which are mutually reinforcing.

The first reference to the 18 April Resolution is at page 134 of the Opinion. In this context the Court is discussing the first group of "international obligations" assumed by the Respondent, that is to say, the ones "corresponding to the sacred trust of civilization referred to in Article 22 of the Covenant", as the Court said at page 133.

The Court concluded, at the same page (133) that these obligations "could not be brought to an end merely because the supervisory organ had ceased to exist. Nor could the right of the population to have the territory administered in accordance with these rules depend thereon".

It is this view, regarding the obligations defined in Articles 2-5 of the Mandate, that the Court, in this context, finds is *confirmed* by Article 80 (1) of the United Nations Charter and by the 18 April 1946 Resolution. They are both *confirmatory* of "general considerations" reached by the Court after study of the Covenant of the League of Nations and of the United Nations Charter.

On page 134 of the Opinion, after quoting relevant excerpts from the Resolution, the Court says:

> "As will be seen from this resolution, the Assembly said that the League's functions with respect to mandated territories would come to an end; it did not say that the Mandates themselves came

to an end. In confining itself to this statement, and in taking note, on the other hand, of the expressed intentions of the mandatory Powers to continue to administer the mandated territories in accordance with their respective Mandates, until other arrangements had been agreed upon between the United Nations and those Powers, the Assembly manifested its understanding that the Mandates were to continue in existence until 'other arrangements' were established."

It will be noted that the Court refers to the *explicit* language of the Resolution and to the *expressed* intentions of the Mandatory Powers to continue to administer the Mandated territories in accordance with their respective Mandates.

Now, the Court's second reference to the Resolution of 18 April 1946—the only reference, incidentally, to which Respondent refers in its presentation—appears in the context of its discussion of Respondent's *second* group of obligations, that is those which the Court says are "related to the machinery for implementation ... closely linked to the supervisory functions of the League". That is at page 136 of the Opinion.

After analyzing the nature and purposes of the functions of international supervision and accountability, in this context, the Court again finds confirmation of its views in Article 80 (1), which, as I say, the Court had interpreted earlier in its Opinion.

The Court, then, finds additional confirmation once more in the "corresponding views" expressed in the 18 April 1946 Resolution. The Court did so in the following words, at page 137 of the Opinion:

> "It recognized, as mentioned above, that the League's functions with regard to the mandated territories would come to an end, but 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. It further took note of the intentions of the mandatory States to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the mandatory Powers. This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations."

Now, just as in the case of its prior reference to the Resolution, the Court refers in this paragraph to the clear and explicit language of the text of the Resolution which it quotes and interprets authoritatively. At the end of the paragraph I would repeat the Court comments that the Resolution "*presupposes* that the supervisory functions exercised by the League would be taken over by the United Nations". They (League Members) had access to Article 80 (1) of the Charter and they interpreted it exactly as this Court does in its Advisory Opinion.

Mr. President, Members of the Court, in this context it seems to us the word "presuppose" is a strong one, since it emphasizes a premise, or supposition, on which the Resolution is based, that the United Nations would take over the League's supervisory function. In this context it seems that it has a greater significance than if the Court had merely said that the Resolution declares, or implies, or used other similar words of interpretation of intention. The Resolution "presupposes" that the

supervisory functions exercised by the League would be taken over by the United Nations. But for such a *presupposition* the League might well have taken different and other action to ensure the continuity and survival of the Mandates until they had been converted into trusteeships or had been otherwise terminated in accordance with their provisions and those of the Covenant.

The Court completes its chain of reasoning on this aspect of the case by pointing out that by Article 10 of the Charter, the General Assembly of the United Nations had been endowed by the Charter with competence "to exercise such supervision and to receive and examine reports" and that Respondent "is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it", that is at page 137.

I have already referred to the Court's holding with respect to the right of petition and to the significance given by the Court to Article 80, paragraph 1, in connection therewith.

And, finally, with regard to question *(a)*, the Court—as I have mentioned—concluded that the compromissory clause of Article 7 is "still in force" having regard to Article 37 of the Statute and Article 80, paragraph 1, of the Charter, and the significance of this fourth reference to Article 80, paragraph 1, and the reference in this context, has been noted earlier in my argument.

In summary, Mr. President and Members of the Court, it is submitted that the following conclusions must inevitably be drawn from the Opinion of 1950:

(1) Disputes regarding interpretation and application of the Mandate are subject to the compulsory jurisdiction of this Court. Such disputes include, *inter alia*, those which might arise concerning the interpretation of Article 6 of the Mandate, or any other provision of the Mandate, and the extent and nature of Respondent's obligations under the Mandate; and

(2) That if the Applicants, who were Members of the League of Nations at the time of its dissolution and are now Members of the United Nations, if Applicants, under these circumstances, do not fall within the class of States competent to invoke the jurisdiction of this Court, no State does.

Under such circumstances the compromissory clause would be a dead letter; Article 80, paragraph 1, of the Charter, the League of Nations Resolution of 18 April 1946, as both of these documents have been authoritatively interpreted by this Court, would be utterly frustrated.

In leaving this respectful analysis of the Advisory Opnion of 1950 I should like to repeat the sense of presumption under which I felt constrained to speak in attempting to analyze, to expound to the Court, the interpretation of an Opinion of the Court involving the issues precisely of the case at Bar.

I turn now to the third major proposition which relates to the Respondent's *de novo* argument, and which submits that the Respondent's *de novo* argument, on the merits, is in conflict with the Advisory Opinion and should be rejected.

We have endeavoured to show that there is no basis for reviewing and reversing the Opinion and that the basis alleged, in connection with

the "new facts" contention, is not valid, the facts being neither new nor crucial nor possessing, indeed, any other material significance.

We have sought, moreover, to show, even if we are wrong in these contentions, Respondent has not complied with even the most minimal standards widely reflected in municipal legal systems, and embodied in the Statute of the International Court itself, to lay a basis for adducing alleged new facts in seeking a reconsideration and reversal of, in this case, a unanimous Opinion.

However, in turning to the Respondent's *de novo* argument I do so essentially in a respectful effort to restore to the record of these statements a balance and a perspective which the grave issues merit, even though it is, as I concede, an argument alternative to my first two major propositions and one in which we do not regard ourselves as necessarily involved.

It may be that light is shed on the arguments which Respondent now offers to the Court by a brief reference to the arguments propounded to the Court by Respondent in 1950. Although the 1950 and the 1962 sets of arguments are couched in different form, comparison of the two reveals, I think, one essential difference, and one only.

I think it fair to say that the difference is that, in 1950, the same major fallacies regarding the nature of the Mandate were presented to the Court, but with greater clarity and concision than is the case today.

In its oral argument and written Pleadings before the Court in 1950 Respondent explicitly and with candour declared that it had ceased to be under any international obligation whatsoever with respect to the Mandate on the ground that the Mandate had lapsed with the dissolution of the League of Nations. Respondent at that time stressed the following contentions, which I should like to summarize.

During the life of the League, Respondent contended, it had owed duties to the League, but then when that organization dissolved, these duties could no longer be performed *vis-à-vis* the League. Inasmuch as the United Nations had not succeeded to the functions of the League in respect of Mandates, Respondent contended that the duties previously owed to the League had lapsed. Respondent had owed certain other duties in respect of Mandates to Members of the League, but when the League dissolved there were no longer any Members of the League, and therefore, contended Respondent, these duties to other States had lapsed.

In 1950, Respondent resorted to the municipal law concept of Mandate in order to establish that the Mandate had lapsed. As Respondent then viewed the Mandate, it was basically an institution requiring a mandator and a mandatory, and if one of the two parties, as it said, fell away, the institution lapsed. Respondent contended in 1950 that since the League had dissolved and the United Nations, in its opinion, was not qualified to exercise the powers of supervision formerly exercised by the League, there was no longer a mandator and therefore the Mandate lapsed.

Respondent's use of "mandator and mandatory" appeared to imply only a two-party relationship, but it nevertheless conceded that League Members, and I quote from the oral argument made by Respondent in 1950, page 289, that the League Members "had legal rights in respect of mandated territories"; but Respondent urged then, "with the disappearance of the League, the rights of third States who were Members

of the League, must necessarily have ceased to exist". That contention appears at page 290 of Dr. Steyn's argument before the Court.

In support of its contention concerning the extinction of the rights of League Members, Respondent in 1950 invoked the example of Germany's unsuccessful effort to assert rights with respect to Belgium's administration of Rwanda-Urundi, since Germany was not then a Member of the League it no longer possessed such rights. Respondent cited this as showing that present League Membership, as Counsel has said, League Membership at the time the action is brought, is a necessary prerequisite for the assertion by States of rights *vis-à-vis* Mandatories, and sought to apply a parity of reasoning to the situation in which the League itself no longer existed.

Mr. President, I come now to the close of my summary of the 1950 contentions. It will be seen, I think, that the echoes of the same contentions are being heard in the corridors of the Court today, twelve years later. To conclude, however, Respondent went on to contend in 1950, that even if it could be said that the Mandate still existed, the Respondent would nevertheless have, and I quote, "no obligations which are international under the Mandate". Respondent at that time, in 1950, argued as follows, and I quote now from page 288 of the Argument:

> "Even if the Mandate still exists, there is now no international organ competent to exercise the supervisory functions and control of the League. There is no international organ to which the Union Government are obliged to submit reports. There is no international organ whose consent is legally required for modifications of the terms of the Mandate. The League having expired, there are no Members of the League who can claim rights in respect of the administration of the Territory. And finally, there is no State legally competent to refer disputes relating to the interpretation or the application of the provisions of the Mandate to the International Court of Justice, the competence to do so having been limited by Article 7 of the Mandate to Members of the League."

These were Respondent's contentions to the Court in 1950 and they were rejected in every respect. The contentions currently being advanced have been skilfully contrived in the light of, or perhaps it would be more accurate to say in spite of, the Advisory Opinion of 1950. Respondent has fashioned a new train of reasoning, one which is more intricate and has more moving parts. In the face of the unanimous opinion of the Court, Respondent seeks to give a different form to the same basic premises which underlay Respondent's contentions in 1950. Respondent contended in 1950, as I have shown, that because of the Mandate's contractual origin, or consensual origin, that Mandatory's consent, tacit or express, was prerequisite to the survival of its duty to account to an international body other than the League, or to submit to the compulsory jurisdiction of the Court in pursuance of the compromissory clause of Article 7.

The 1962 model contention is that all of Respondent's rights are preserved, but none of its obligations of international accountability.

Such a proposition, which I have characterized as the doctrine of convenient and partial lapse, I think deserves thorough examination. The Advisory Opinion itself, at page 133, described precisely this

result as, and I quote the Court's word, "unjustified", I have noted this earlier in my argument. Respondent has not taken direct or express note of this obviously just proposition of the Court, either in its Preliminary Objections or in its Oral Statements.

Respondent seeks to support its doctrine of convenient and partial lapse by means of an artful and self-serving misinterpretation of certain legal analysis appearing in the separate Opinion of Judge McNair.

At page 299 (I) of the Preliminary Objections, Respondent purports to interpret the majority Opinion as follows:

> "In the 1950 Advisory Opinion the Court in effect held that, in addition to its operation as a treaty or convention, the institution known as the Mandate for South West Africa acquired an objective, or 'real' existence, as constituting a special status for the Territory and that in this objective or 'real' aspect the Mandate survived the dissolution of the League."

That is the Respondent's contention and interpretation of what it says the Court in effect held. I find no such implication or inference to be drawn from the Advisory Opinion as we have read it. At page 299 (I) of the Objections, footnote 2 gives three citations to the Advisory Opinion to support this very important proposition. These citations are presumably intended to indicate the portions of the Opinion which justify Respondent's very novel interpretation of the Court's reasoning. One citation in the footnote on page 299, is to the separate Opinion of Judge McNair. Another citation is to the separate Opinion of Judge Read.

The only citation—the remaining one of the three—which is addressed to the majority Opinion itself, cites page 132. Mr. President, one searches page 132 in vain for statements of the Court which furnish a plausible basis for Respondent's ingenious interpretation of the holding. Respondent, as I have reminded the Court, at page 299 of the Preliminary Objections says that the Opinion "in effect" held that in addition to its operation as a treaty or convention, the institution known as the Mandate for South West Africa acquired an objective or real existence, as constituting a special status for the territory, and that *in this objective or real aspect, the Mandate survived the dissolution of the League.* It is the last clause to which Respondent no doubt attaches the most significance. It is this last clause which I find unsupported by anything on page 132 of the Opinion. Perhaps fair analysis of Respondent's meaning in its contention as to what the Court in effect held, would have been aided by reference to the language at page 132, to any language which Respondent regarded as supporting its interpretation of what the Court, "in effect, held". At page 132, as the Court will note, the Opinion rejects Respondent's 1950 contention that the Mandate had lapsed because the League had ceased to exist. The Court points out that the League was not a "Mandator" in the municipal law sense, but "had only [I quote] assumed an international function of supervision and control". The Opinion goes on, at the same page:

> "The object of the Mandate regulated by international law far exceeded that of contractual relations regulated by national law."

The phrase "far exceeded", in this passage, seems to be noteworthy.

After commenting upon the international object of the new international institution, the Court found that the international rules regulating the Mandate constituted an international status for the Territory, and accordingly the Court concluded at the next page, page 133:

> "The authority which the Union Government exercises over the Territory is based on Mandate. 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."

It is this line of reasoning and conclusions, together with rationale, in the Court's Opinion (or somewhere in the reasoning and conclusions), in which Respondent has searched for, or discovered, that in the Opinion the Court had held that it was in this objective or real aspect, in which the Mandate survived the dissolution of the League.

The Court itself goes on to say that the Union remained "under an obligation to submit to a supervision by the new organ, that is, the United Nations, and to render annual reports to it". It was in that sense, of course, that the Mandate survived—the Union was under an obligation to carry out its promises in the Mandate and to respond to international supervision and control. It was in that sense, and in that sense only, that the Court found that the Mandate had survived, and it found it explicitly.

Respondent's single citation to page 132 of the Majority Opinion to support its contention, therefore, refers to a page of the Opinion which sets forth a rationale contrary to Respondent's thesis. Moreover, page 132, in a lawyer's sense, embodies no holding whatever; merely two paragraphs of relevant history, followed by two paragraphs of impeccable reasoning. If Respondent's contention to what the Court "in effect held" implies the reference to the last sentence on page 132, then Respondent, I submit, is merely making a play on the words, "international status" in that sentence.

Having thus injected into its argument a dichotomy between the real or objective status on the one hand, and the contractual status on the other, which is the Respondent's and not really that of the Court, Respondent goes on to say, and I quote from the Preliminary Objections at page 299 **(I)**:

> "The correctness or otherwise of this proposition does not require to be reviewed for the purpose of Respondent's Objection to jurisdiction..."

Standing by itself, this statement might well arouse curiosity as to why, then, so doubtful a proposition is brought into play in the first place. But the mystery is solved almost at once. Respondent's Preliminary Objections proceed to do precisely what the Respondent has said is not necessary to its argument. Respondent accepts, or does *not deny, the notion* that the Mandate survived in an objective or real sense, although it submits this only arguendo; it rejects the notion that the Mandate survived as a Convention or Treaty in force for the purpose of founding jurisdiction under Article 37.

By contrast, Judge McNair, in his separate Opinion, says:

> "In my opinion the new regime established in pursuance of this principle has *more than* a purely contractual basis." *(Ital. added.)*

That is at page 154 of the reports. Respondent, unlike the learned Judge, strenuously seeks to sever the "contractual" or "treaty" aspects from the "real" or "objective" aspects, of the Mandate. Then Respondent uses the demise of the League, as a contracting party, coupled with a strained and unrealistic interpretation of Article 37 of the Statute, as a vehicle for arguing that the Court has no jurisdiction. The result of Respondent's argument is that the contractual aspect of the Mandate is used to deprive the status aspect of all meaning. For Judge McNair, the status and the contractual aspects of the Mandate were complementary and mutually reinforcing. He said that the new regime established had "more than" a purely contractual basis. For Respondent, the former neutralizes or sterilizes the latter. Now, this verbal legerdemain has two consequences, both of which are presumably intended.

As I said, this verbal magic has two consequences, both of which are presumably intended. The first is the contrivance of a theory which I submit is erroneously imputed to the Court, whereby the Mandate somehow survives, but only just enough to keep the Respondent in unsupervised possession of the Territory. Like the Cheshire cat, the hard substance of enforceable obligation vanishes, while the smile of rights and benefits remains. It is precisely this consequence which the Court said "could not be justified". It is submitted that Respondent's contention in this regard is directly in conflict with logic, justice and the rationale and holding of the Court's Opinion.

Having pursued to its dead end Respondent's misreading, as I submit, of page 132 of the Court's Opinion, it is now in order to analyse and attempt to answer other contentions of Respondent, the correctness of which may, in its own view, have more relevance than Respondent attributed to its theory which I have just discussed.

In our Memorials, we submit that the jurisdiction of the Court is founded "on Article 7 of the Mandate and Article 37 of the Statute of the International Court of Justice, having regard to Article 80, paragraph 1, of the United Nations Charter". (Page 88 **(I)** of the Memorials.)

Counsel, in the course of his Oral statement, explicitly sets forth the basic contention upon the basis of which Respondent joins issue with Applicants. Respondent contests the jurisdiction of this Court "to hear or adjudicate the questions of law and fact raised in the Applications and Memorials". (I now have quoted from the Respondent's submissions.)

In the Verbatim of 2 October at page 32, *supra*, Counsel expressed his contention as follows—I quote his own words:

> "So our second contention is that even if the Mandate could, in other respects, be said to be still in force as a treaty or convention within the meaning of Article 37 of the Statute, Article 7 of the Mandate itself ceased to be so in force."

And then continuing:

> "Thirdly, Mr. President [said the Respondent's Counsel], on basically the same argument as applies to our second contention, namely that another Member of the League of Nations is necessary for operation of Article 7, there follows our third contention which is merely an alternative way of putting the same argument and that is that even if the Mandate, including Article 7 thereof, could be said to be 'a treaty or convention in force', neither of the Appli-

cants is qualified to invoke it as 'another Member of the League of Nations' within the meaning thereof. And [said Respondent's Counsel] it is mainly because of the overlapping between the second contention—which is really still part of our First Objection—and this third contention which is our Second Objection—it is mainly because of that overlapping that I trust the Court will find it convenient if I carry on as I propose and that is to deal with those two Objections together and not to separate them entirely."

Candour compels us to confess to the Court that we had precisely this difficulty in dealing with the Preliminary Objections in sorting out what are stated as alternative or different theses, but which, as Counsel frankly described in his oral argument, is really another way of saying the same thing, or in his own words "an alternative way of putting the same argument". I will deal with this in a moment.

As Respondent concedes, at page 32, *supra*, of the Verbatim to which I have just referred—that is the Verbatim of 2 October—the contention that neither of the Applicants is qualified to invoke Article 7 as "another Member of the League" is, as I have just said and I repeat, according to Counsel merely an alternative way of putting the same argument, that is that Article 7 is not in force, if I understand him correctly.

That these contentions are merely two ways of making the same point is logically inescapable. It is, indeed, possible to establish it as a *quod erat demonstrandum* in terms of the 1950 Advisory Opinion. I have ventured to point out at the outset of my oral statement that Respondent's *de novo* argument is necessarily directed at the merits of the Advisory Opinion and particularly must be directed at, or considered as an attack upon, or a questioning of, the soundness of its rationale. I have also earlier in my statement ventured to analyse that opinion and point out the rationale of the Court's holding that Article 7 of the Statute, referring in this context to the compromissory clause, is still in force:

> "having regard to Article 37 of the Statute and Article 80 (1) of the Charter and that therefore the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions".

I shall state my *quod erat demonstrandum*.

Proceeding then from the Court's holding that the compromissory clause is a treaty or convention in force withing the meaning of Article 7 of the Statute, the following sequence of propositions may be set out:

1. If the clause is in force there must be States capable of invoking it in an appropriate case.
2. If Applicants lack the capacity to invoke the clause, all States do. Respondent has not contended otherwise.
3. If no State has the capacity to invoke the clause, it would be a nullity and Respondent would not be under the obligation to accept the Court's compulsory jurisdiction as the Court held it to be; and
4. The conclusion must be that Applicants have a *locus standi* to invoke the clause unless, of course, and here we come to the point, the Court reverses the 1950 holding in this regard.

There is no basis asserted by Respondent which would justify the Court reversing its holding with respect to the validity and continuing effect of the compromissory clause, at least in our respectful submission, no contention which is worthy of the Court's consideration.

[Public hearing of 17 October 1962, morning]

If it please the Court, I should like at the outset of my remarks this morning to make a correction of my statement of October 16 in the Verbatim at page 294, *supra*. There I stated, and I quote from the Verbatim, and this is a correct reflection of what I did say, quote, "No statements on the part of any other delegations at the session of the Committee appear in the Minutes of the Committee". That refers to the session of the First Committee of the twenty-first session of the League of Nations General Assembly in April of 1946, that was the third meeting of the First Committee. On re-checking the record, in order to be certain of the accuracy of my Verbatim, I did discover an error in my statement. There are reflected in the minutes of the third meeting of the First Committee two additional statements made by honourable delegates at the session, one by the Australian delegate who announced the intention of his Government to administer the Mandate, and I quote "in accordance with the provisions of the Mandates" (at page 79 of the Minutes), and the second, a statement by the delegate of France in which he announced that his Government would continue to administer all of the Mandated territories, and I quote, "in the spirit of the Covenant and of the Charter". Those two statements were made in addition to Sir Hartley Shawcross' statement in which he seconded the proposal of the Chinese delegate. The only other action reflected in the third session of the First Committee was the abstention on the part of the delegate of Egypt in the vote on the Resolution of 16 April. That ends my correction.

Mr. President, may I refer now to a photostat copy of an excerpt of Minutes of the second meeting of the First Committee, which I received at my residence through the good offices of the distinguished Registrar last night? A scanning of the photostat copy of the excerpt reveals the text of a draft resolution, as it is described. This is the Chinese draft proposal referred to in the Preliminary Objections at page 253 (I). I pointed out in the course of my argument that the text quoted, at page 253 of the Preliminary Objections, was not cited in any document. This then is the document to which the implicit reference is made. The document, as I understand, was transmitted by the Head Librarian of the United Nations headquarters in Geneva, and it is in the form of an excerpt, as I say. Mr. President, I think the Court should note that the text of the draft Chinese proposal, as it is set forth in the document to which I refer, is not identical with the text of the resolution quoted at page 253. I do not contend that the differences in language are substantial in meaning, at least my reading of them does not indicate any substantial difference in meaning. However, it is after all the Respondent that has introduced into this debate the question of accuracy of documentation, and it therefore seems a puzzling aspect of the matter that the text, which is quoted at page 253, does not correspond in language with the

text in the document now seen by the Applicants for the first time. I do not want to trespass on the Court's time to dwell at length upon this, but just as an indication, in the second paragraph of the text, as it is quoted at page 253 **(I)**, the words appear "after the dissolution of the League". Those words do not appear in the text of the draft resolution in the document which has been furnished by the Head Librarian of the United Nations, and there are three or four other similar differences. Therefore, it is not clear, on the basis of anything which is known to us, exactly what is the source of the so-called text which is quoted at page 253 of the Preliminary Objections.

Mr. President and Members of the Court, at the close of the session yesterday I had undertaken to establish, in the form of a *quod erat demonstrandum*, that unless Applicants have a *locus standi* in this procedure, no one else does. If no State has the capacity to invoke the compromissory clause it would become a nullity, and, unless the Court reverses its holding that the Article is in force, it would follow that the Applicants must have a standing.

The Respondent itself, speaking through its Counsel, at page 198, *supra*, of the Verbatim, said as follows:

> "Mr. President, the conclusion to which the portion of the argument with which I have just dealt is that stated by way of alternatives in our second and third contentions, namely, that by reason of there no longer being any Members of the League, Article 7 has ceased to be in force as a treaty or convention, or alternatively, *if it is still so in force, then there are no States competent to invoke it.*"

Respondent has insisted, in another context, upon according a literal interpretation of the phrase "another Member of the League", as it appears in Article 7, on the ground that words should be given their "normal and natural meaning".

If Article 7 is "in force", to quote the language of the Court, there must be States competent to invoke it or it is not in force. Hence, Respondent, contrary to its own principle, of strict and literal interpretation, fails to apply the same standard to the language of the Court.

It may be appropriate now to clear up a confusion which cuts across much of Respondent's reasoning relative to its First Objection. Both in the Preliminary Objections and in oral statements, Respondent has made an elaborate argument *de novo* with respect to Article 6 of the Mandate Agreement.

In our written Observations, at page 428 **(I)**, we comment upon the fact that more than one half of Respondent's First Objection is devoted to a discussion of the question whether Article 6 of the Mandate is in effect. We remark at this point in our Observations, page 428, that the Preliminary Objections fail to indicate:

> "what relevance the question of United Nations supervision has to jurisdiction, which is the sole issue in these ... proceedings".

Respondent's Counsel, himself, made the same point at page 35, *supra*, of the Verbatim. He said, and I quote:

> "You will have noted, Mr. President, that in our original Observations [by which he was referring to the Preliminary Objections]

we deal very fully with a contention to the effect that the Respondent's obligation of report and accountability to the Council of the League in terms of Article 6 of the Mandate Agreement has lapsed, and that has not been replaced by, or modified into, any obligation of report and accountability to any organ of the United Nations. We deal, as I say, very fully with that proposition. [And then Counsel concludes:] *That, of course, is not in itself an objection to jurisdiction—we fully realize that.*"

That is in the Verbatim of 2 October at page 35, *supra*.

Counsel, however, then proceeds to argue that the question regarding Article 6 is nevertheless important because, as we understand him, he says it is really the *Applicants* who are seeking to establish the relevance of Article 6 to the question of jurisdiction. Counsel appears to base this attribution to us on the ground that the Applicants, as he says, "rely on" United Nations succession—I quote from the 2 October Verbatim at page 35, *supra*.

But, Mr. President, it is not the Applicants who "rely on" United Nations succession. The Court itself decided that issue in the Advisory Opinion of 1950. We draw the necessary inference from the Court's Opinion. We do not bear the burden of sustaining the validity of the Opinion of the International Court of Justice.

Respondent's arguments, in this respect as in others, should be addressed to the merits of the Advisory Opinion, not to the merits or demerits of our arguments which seek to support it and to draw logical inferences from it. The comment in our Observations at page 429 **(I)** concerning the interconnection between Articles 6 and 7 to which Respondent's Counsel has referred, likewise proceeds from the Advisory Opinion. Our arguments are in the *light* of the Opinion. Respondent's arguments are in the *teeth* of the Opinion.

Respondent has also engendered some confusion, we think, with regard to a comment in our Observations at page 446 **(I)**. We say there:

> "There is at the very least a *de facto* carry-over of the League's responsibilities to the extent that an important function of the League continues beyond the League's formal existence."

As I have demonstrated, it follows inescapably from the 1950 Advisory Opinion that Applicants have a *locus standi*, as United Nations Members, in the cases at bar. In the event, however, that the Court should, for reasons which are not apparent—respectfully—to the Applicants, if the Court should reverse its holding that Article 6 is still in force, then we would contend, as we do here, that Applicants must have a *locus standi* as former Members of the League of Nations because if they do not, the unanimous holding of the Court that Article 7 is in force is reduced to a nullity. It is a perfectly logical proposition, and it is precisely in this sense that we have referred to the point. If the language is elliptical I express our regret and welcome this opportunity to clear up what seems to be an inescapably logical deduction.

Respondent does not address itself, at any point so far as we have observed, to the merits and soundness of the Advisory Opinion. Its entire argument seems to be based upon the premise that, because of alleged "new facts", the Advisory Opinion should either be reversed or presumably ignored, as has been Respondent's practice for the past twelve years.

I have trespassed on the patience of the Court in an effort to show that the Advisory Opinion was not a product of ignorance of fact, and that there is no basis for reopening it.

Whether Respondent is correct in what may be an implicit contention, that the Opinion of the Court was the result of faulty reasoning, or unsound rationale, is a matter which—I respectfully submit—must be decided, and can only be decided, by the Court itself.

I have thus far, in the course of my Statement, under the heading of major proposition 3, attempted to show that unless Applicants have a *locus standi*, no State does, and the compromissory clause would accordingly be deprived of life, despite the Court's holding of 1950, unanimous holding, that it is still "in force".

I turn to the alternative argument by which Respondent seeks to rob Article 7 of its life. Respondent contends that the phrase "another Member of the League of Nations" in Article 7 should be given a literal interpretation.

Respondent concedes that such a literal interpretation would nullify the Court's holding with respect to the compromissory clause being in force. I have quoted from the Verbatim at which that concession is made. Accordingly, Respondent's contention necessarily implies a rejection of the merits of the Court's holding on this issue, as well as the rationale of its holding.

But Respondent does not address itself to a demonstration that the Court's holding, that Article 7 is in force, is untenable or that the Court's reasoning in support of that holding is not sound. Respondent makes a *de novo* argument, as is clear, to justify a reversal of the Opinion, but the arguments which Respondent makes were, in essence, all before the Court in 1950 as I have attempted to show in my analysis of Respondent's 1950 contentions and of their current 1962 model. The contention that "new facts" present "new issues of substance" to the Court now, as Counsel has put it (at page 33, *supra*), has, I trust, been exposed.

Mr. President, what then does Respondent have to say about the Court's reasoning and holding with regard to the crucial Article 7—the validity of which is the sole issue in these proceedings—and, in particular, the compromissory clause of Article 7? I have shown that unless Respondent succeeds in persuading the Court to reverse its unanimous holding at Article 7, the compromissory clause is in force and Applicants must have a *locus standi*.

During the course of his oral statement on 9 October, Respondent had something to say on the subject of the Court's Opinion with regard to the compromissory clause. The Court's attention is respectfully directed to the Verbatim of that day, beginning at page 184, *supra*.

Counsel introduced the subject with something of an understatement. He said:

> "That Opinion contained a finding to the effect that Article 7 must still be regarded as being enforced."

With respect, I think an analysis of the Opinion will show that the Court made a quite explicit holding on the point, and not an implicit "finding", as the Respondent characterizes it. Then Counsel goes on:

> "The only reasoning specifically indicated as being applicable on this point is to be found at page 138 of the Opinion and is stated in a single sentence."

The "single sentence" to which Counsel refers is the sentence at page 138 of the Advisory Opinion, which reads as follows, and I quote:

> "Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions."

However, the *rationale* of the Advisory Opinion regarding Article 7 embodies more, very much more, than the "single sentence" quoted by the Respondent. The *rationale* in the Opinion pertinent to the Court's holding that Article 7 is in force begins on page 132 of the Opinion. I refer to the Court's analysis in the last full paragraph on page 132 of the Advisory Opinion concerning, in the Court's language, the "... legal situation created by Article 22 of the Covenant and by the Mandate itself". Obviously the legal situation created by the Covenant and the Mandate extends to Article 7 of the Mandate as well as to any other provision.

Rationale pertinent to Article 7 is found in the Opinion also at the next page, on page 133, where the Court describes the international obligations of the Respondent in the light of the legal situation created by the Covenant and the Mandate. Indeed, at the top of page 133 is found an explicit reference to Article 7 itself, and the Court says that Article 7 shows, and I quote, "The essentially international character of the functions which had been entrusted to the Union"—that is in the first full paragraph on page 133.

Above all, however, emerging from the Opinion with a force that cannot be denied, stands the significance of Article 80, paragraph 1, of the Charter which the Court refers to in this "single sentence", to use Respondent's characterization. As I have pointed out, the Court, in its Opinion, has three times prior to this point cited Article 80, paragraph 1, as having been designed to conserve all rights of peoples of Mandated territories to international supervision and judicial protection.

Respondent does not adduce any arguments or facts, except the so-called "new facts", the effect of which I have dealt with, tending to impair the Court's reasoning with regard to Article 7 or to impeach the Court's conclusion with regard thereto. The significance of the reference in this "sentence" to Article 80, paragraph 1, seems to have escaped Respondent.

Another illustration of Respondent's failure directly to seek to impugn or raise doubt concerning the soundness of the Court's reasoning, in another context, may be found in connection with the Court's conclusion at page 133 of the Opinion that—I quote—"To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." As I have shown, the "obligations" to which the Court here refers include the obligation of international reporting and accounting, including submission to the compulsory jurisdiction in appropriate cases arising under the compromissory clause.

Respondent nowhere in its Preliminary Objections or oral statements frankly or explicitly adverts to the Court's conclusion with respect to this unjustified result which would follow, despite the fact that Respondent's analysis of its own legal position leads precisely to the result condemned by the Court in the sentence just quoted from page 133. In this respect it is submitted that Respondent's 1962 argument is somewhat less forthright than the contentions which Respondent submitted to the Court in 1950. The Court's attention is directed to the Written statement submitted at that time at pages 83 and 84 of the volume of *Pleadings*, where Dr. Steyn, the able Counsel for the Republic of South Africa, said as follows:

> "The Government of the Union of South Africa would close this statement by expressing their view that the Territory of South-West Africa falls, at present, under no known category in international law. It was taken by conquest by the Union of South Africa during the 1914-1918 War and subsequently placed under mandate which has now lapsed. It is not a colony, or an independent State or part of the territory of the Union of South Africa. Its status in international law is *sui generis,* and it is being administered in accordance with a system which is *sui generis*, but which is nevertheless not inconsistent with the objectives of the Charter of the United Nations."

And Counsel went on, in 1950:

> "It is the considered view of the Government of the Union of South Africa that there is no international legal limitation upon their competence in respect of the territory and that their international obligations, arising from the status of the territory, are to be determined accordingly."

That's the end of the quote, of the frank and explicit contention made in 1950. It was the "considered view" of the Government of the Union that this result follows.

In the 1962 argument, Mr. President and Members of the Court, Respondent makes no statements of that explicit nature; all of Respondent's contentions, and this in particular, are submitted as contentions for the purposes of argument only, submissions *arguendo;* there is no "considered view" presented frankly to the Court at this stage.

But the import of Respondent's argument, without regard to the string which is attached to it, the import of Respondent's argument seems to be that the only sense in which any obligations may have survived—and, as I say, this is only contended *arguendo*—that the only sense in which any obligations may have survived is on a basis which involves no international obligations to report and account for itself, while at the same time retaining all of its rights of possession and administration. This is precisely what the Court said in its Advisory Opinion could not be justified. Yet, instead of answering the Court's comment, Respondent merely takes a position which makes a mockery of it.

It remains only to add that Respondent's theory of partial lapse, the theory submitted *arguendo*, wholly ignores universally accepted principles governing fiduciary responsibilities. The law of no civilized nation with which Applicants are familiar accepts as a consequence of the dis-

appearance of dissolution of a supervisory or accounting authority that the property ends up in the pocket of the trustee.

The doctrine of "unjust enrichment" or, in French, *"enrichissement sans cause"*, is a general principle of law recognized by civilized nations. It is prevalent, of course, in the civil law and the common law. In the United Kingdom and in the United States it receives frequent expression in the application of the rules of "money had and received", "quasi-contract", "constructive trust" and the like.

The principle of unjust enrichment was applied in an arbitral proceeding, notably in "The *Lena Goldfields* Arbitration in 1930" which is cited in the *Annual Digest*, 1929-1930, Case No. 1 and 258, cited by Lord McNair in the 1957 *British Year Book of International Law* at page 10. The *Lena Goldfields* Arbitration proceeding is discussed at length in the article which I have just quoted, and which is entitled "The General Principles of Law Recognized by Civilized Nations". The arbitrators in *Lena Goldfield* applied Article 38, paragraph 1 *(c)* of the Statute of the Permanent Court of International Justice as a basis for holding that the doctrine of "unjust enrichment" or *"enrichissement sans cause"* is a "general principle of law recognized by civilized nations".

Mr. President and Members of the Court, in the course of the French translation, if I understood correctly, reference was made to the "legislation" of civilized States in connection with the principle. That, of course, is undoubtedly true, but I would point out that, in my sense of the use of the word the "law" of civilized States, I of course included "judicial" decisions as well as legislation.

The *core* of this principle of "unjust enrichment" *("enrichissement sans cause")*, *especially* as applied to *fiduciary* undertakings, received its full affirmation, it seems to me, in the Court's holding in 1950 in the conclusion to which I have addressed myself. The use of the term "justified" in a legal opinion, as I have said earlier in my statement, must undoubtedly refer to legal as well as moral concept.

It remains now only to deal with Respondent's Third and Fourth Objections. There is little that needs to be added by way of detailed discussion to the considerations we have set forth at pages 450-744 **(I)** of our written Observations.

Counsel for Respondent have not, so far as we have observed, raised any points of substance which are not covered in the Observations.

Mr. van Muller, speaking for the Respondent, correctly summarized the Applicants' position in the Verbatim, at page 203, *supra*, when he said, and I quote, that it was our position, and it is:

> "... that the Members of the League were intended to have individually a legal interest in the observance by the Mandatory of the conditions imposed in the Mandate...".

That indeed is our contention.

However, it does seem that learned Counsel begged the question when, at the same page of the Verbatim, he attributed to Applicants the contention:

> "... that is so even in cases where the breach of these obligations by the Mandatory did not affect the material interests of individual League Members, either directly or through their nationals...".

Our actual contention, Mr. President, as I think appears from the Observations, is that the test of "material interest" is irrelevant, but that in any event we insist upon a more realistic interpretation of "material interest" than does Respondent. We feel that we qualify under both or either. Respondent's narrower conception predates the Covenant of the League. It reflects a perspective which was rejected in 1920. It is surprising to hear it restated in 1962.

Moreover, much of Respondent's argument involves an effort to find a definition of "dispute" which means something other than "dispute".

Respondent and Applicants both cite the *Mavrommatis* case. We cite it because of its clear definition of "dispute", emphasizing as it does that a dispute "may be of any nature", so long as it relates to the "interpretation or the application of the provisions of the Mandate". Respondent nowhere denies, nor can it deny, that this is the subject-matter of the dispute in the cases before the Court.

Respondent appears to rely on *Mavrommatis* as supporting the proposition that a dispute must be of a "material nature", in order to be judicially cognizable by this Court under this article. If this were to be accepted, there would be no method of compelling—as distinguished from exhorting—the Mandatory to discharge its responsibilities under the Mandate.

As we note in our Memorials, at page 93 **(I)**, Respondent's Counsel in the 1950 proceedings *conceded* that in their capacity as Members of the League:

> "... third States were competent to uphold the rights of the inhabitants of mandated territories or to claim rights for themselves in those territories".

That is at page 290 of the volume of the *Pleadings*.

Respondent's contention in this respect is but one more method of evading the clear force and meaning of the Advisory Opinion. It nullifies the clear intent of the Court in upholding the compromissory clause, in the light of Article 80, paragraph 1, of the Charter. That paragraph, as the Court said, is intended to preserve the rights of the inhabitants of the territories "in all respects". Respondent never lacks ingenuity in its search for detours around the "natural and normal" meaning of words in the Advisory Opinion.

Counsel stresses the fact that the League Covenant makes no explicit mention of judicial supervision over the Mandate. That is true, but he draws the conclusion that therefore it is, in his words, "unlikely" that "Article 7 of the Mandate was intended to establish a form of judicial supervision". (Verbatim of 10 Oct.)

But, as we attempt to show, at pages 463-469 **(I)** of our Observations, judicial and scholarly authority combine to refute this inference.

Mr. President, we submit that the restrictive, artificial construction given by Respondent to the words *"any dispute whatever"* which appear in Article 7 again involves the application by Respondent of a double standard of logic which is difficult to comprehend.

When it suits Respondent's purpose—as in the case of the phrase "another Member of the League" in Article 7—Respondent contends that words should be given their natural and normal meaning. What Respondent really means is that they should be given a literal signification

regardless of the result which might deprive the instrument of effectiveness.

Nevertheless, when it comes to interpreting the phrase "*any dispute whatever*" in the same article, Respondent forsakes its principle of giving words their literal meaning. Indeed, Respondent in this case does not even accord the words their "normal and natural meaning". Instead of meaning "any dispute whatever" the phrase, Respondent submits, means any "dispute involving a material interest", and Respondent admits to the Court that the notion of "material interest" is not capable of precise definition. May I adopt Respondent's, or borrow Respondent's, style of presentation, skilful as it is? It would in this case then have been the words of the language of the authors, if they had intended to reach the result contended for by Respondent, that instead of "any dispute whatever", their words would have been "any dispute involving a material interest of a third State, as that material interest may be defined from time to time by the Respondent".

However, Respondent leaves until last the most extraordinary contention of all. Respondent argues that it is not correct to say that this dispute "cannot be settled by negotiation".

And how does Respondent suggest that the dispute *can* be settled by negotiation and that the Court should accordingly refuse to hear and adjudicate the merits of the dispute?

Respondent bases this contention on the ground that the Applicants have, in effect, not really negotiated in good faith; that they have, through the agency of the United Nations, been taking a peremptory, arbitrary, inflexible position, thereby thwarting genuine efforts to settle the dispute by negotiation. That, as we understand it, is the essence of Respondent's contention.

And what is the Applicants' peremptory, inflexible position? It lies in its insistence that Respondent comply with this Court's Advisory Opinion! One might understand the argument if it were turned the other way around. If the Applicants, or the agency through which the Applicants deal—that is, the United Nations—were insisting that the Respondent take action *inconsistent* with an Advisory Opinion, there might be some plausibility in Respondent's argument in this respect.

Respondent shows, by the very contentions it makes before this Court, why the General Assembly of the United Nations, after twelve years of frustrated effort to induce Respondent to comply with its judicially established obligations, found, by Resolution of December 18, 1960, that the dispute—and I quote from the language of the United Nations Assembly's resolution—"cannot be settled by negotiation". Lest there be any possible doubt concerning the fact, I think it may be fair to say, Mr. President and Members of the Court, that the deadlock is now being enacted before the eyes of the Court, in the same terms and with continued adherence to the same discredited position which Respondent manifested in the proceedings of 1950 and has manifested ever since.

If it please the Court, I shall now summarize the conclusions which, we submit, are justified by the considerations which have been placed before the Court in our oral statements:

1. Respondent has laid no adequate basis for reopening, reconsideration or revision of the Advisory Opinion of 1950.

2. The Court's Advisory Opinion of 1950 is valid and sound and the

principles and holdings embodied therein are relevant to, and should be applied in, the cases at bar.

3. Respondent's contentions with respect to the merits of the issues at bar are not sound, are not valid; they are in conflict with the rationale and holdings of the Advisory Opinion of July 11, 1950, and, accordingly, should be rejected by this honourable Court.

Mr. President, I now have the honour to read to the Court the Submission of the Governments of Ethiopia and Liberia in these proceedings. The Submission is as follows:

MAY IT PLEASE THE COURT to dismiss the Preliminary Objections raised by the Government of the Republic of South Africa in the South West Africa cases, and to adjudge and declare that the Court has jurisdiction to hear and adjudicate the questions of law and fact raised in the *Applications* and *Memorials* of the Governments of Ethiopia and Liberia in these cases.

Respectfully submitted.

Thank you, Mr. President and Members of the Court, for your courteous and attentive consideration.

Le PRÉSIDENT: Deux Membres de la Cour, M. le Président Basdevant et sir Percy Spender, désirent poser des questions aux Parties et j'invite le Greffier à donner lecture de la question posée par M. le Président Basdevant.

Le GREFFIER: Dans ses conclusions soumises à la Cour le 11 octobre 1962, le Gouvernement de la République sud-africaine « conclut à ce que les Gouvernements de l'Éthiopie et du Libéria n'ont pas de *locus standi* dans la présente procédure contentieuse et à ce que la Cour n'a pas compétence pour connaître des questions » qui lui ont été soumises par les requêtes des demandeurs, cela notamment parce que l'Éthiopie et le Libéria ne sont pas membres de la Société des Nations « ainsi que l'article 7 du Mandat pour le Sud-Ouest africain l'exige pour qu'il y ait *locus standi* ».

L'expression *locus standi* ici employée ne se trouve ni dans le Statut ni dans le Mandat. L'agent du Gouvernement de la République sud-africaine est prié d'expliquer quel est le sens et quelle est la portée de cette expression.

L'attention de l'agent des demandeurs est également attirée sur l'emploi qu'il a fait de cette expression à la fin de l'audience du 16 octobre.

Le PRÉSIDENT: Je donne la parole à sir Percy Spender.

Sir Percy SPENDER: Mr. President, there are some matters to which I would be glad if the Parties would direct specific attention.

The jurisdiction of the Court is sought to be founded upon a treaty or convention within the meaning of Article 37 of the Statute of this Court, by virtue of which treaty or convention a Mandate was conferred upon and accepted by the Respondent upon the terms or provisions set out in Annex B to both the Preliminary Objections and the Observations.

Annex B recites that the Principal Allied and Associated Powers had agreed, in accordance with Article 22 of the Covenant, that a Mandate should be conferred upon the Respondent and had proposed that it should be formulated in the terms which followed. It further recited that

the Respondent had undertaken to exercise the Mandate on behalf of the League of Nations in accordance with the provisions set out thereunder.

Annex B is a copy of a "Declaration" of the Council of the League which purports to confirm the Mandate in accordance with the said terms or provisions and to define the degree of authority, control, or administration pursuant to Article 22 (8) of the Covenant, and bears date the 17th December 1920. The Mandate presumably commenced to operate as from that day.

I would appreciate it if the Parties to these proceedings would give attention to the following questions and afford their answers in as summary and as precise a form as possible:

The *first question* is: Had the terms or provisions of the Mandate as they appear in that Declaration, and the designation of the Respondent as Mandatory, already been agreed to between the Principal Allied and Associated Powers and His Britannic Majesty on behalf of the Respondent prior to any action taken thereon by the Council of the League, subject however only to the approval by the Council of these terms or provisions to the extent it was required to define the degree of authority, control, or administration to be exercised by the Mandatory under Article 22 (8) of the Covenant, and to satisfy itself that these provisions and terms were not inconsistent with the provisions of Article 22 of the Covenant? If so, in what document or documents is such agreement recorded?

Question 2: Did the Council of the League, in relation to the creation of the Mandate, have under the Covenant or otherwise any power or authority

(a) to determine the terms and provisions of any mandate other than those which defined the degree of authority, control or administration to be exercised by the mandatory and to ensure that the terms and provisions were not inconsistent with the provisions of Article 22 of the Covenant?

or *(b)* did it have any power or authority to designate a mandatory or confer a mandate on any Power?

And did it ever purport to exercise any such power or authority in relation to the Mandate?

Question 3: Does any party to these proceedings claim that the Declaration by the Council (Annex B) is *in itself* a treaty or convention?

Question 4: If this Declaration was not in itself a treaty or convention, what were the constituent elements which comprised the treaty or convention; in particular, what other agreements, if any, or what other acts on the part of any State or States established the treaty or convention in relation to the Mandate on the terms or provisions set out in the Declaration?

Mr. President, in the light of such answers as may be given to the above questions, I ask answers to these final questions:

A. Who in 1920 were the parties to any treaty or convention by virtue of which the Mandate was conferred upon the Respondent upon the terms or provisions set out in the Declaration?

B. If States, Members of the League, were parties to such treaty or convention:

(1) Was the treaty or convention registered under the provisions of Article 18 of the Covenant and the machinery for registration established by the League? If so, by whom was it registered and to whom was the certificate of registration issued?

(2) If not registered, what significance, if any, is to be attached to the fact of non-registration?

C. Finally, would the Agent for the Applicants be good enough to state who, at the date of the Application in these proceedings, were the parties to the treaty or convention?

Thank you, Sir.

Le PRÉSIDENT: MM. les agents des Parties trouveront le texte de ces questions dans le compte rendu de l'audience de ce jour. Il est entendu qu'ils n'ont pas à donner leur réponse immédiatement. Ils pourront le faire au cours de leur réplique et duplique, en tout cas avant la clôture de la procédure orale.

Maintenant je me tourne vers M. l'agent de la République sud-africaine pour lui demander quand il pourra commencer la réplique orale.

Dr. VERLOREN VAN THEMAAT: Mr. President and Honourable Members of the Court, we would be able to reply to Applicants' contentions, his Oral Statement, on Friday, but these questions involve some research into history. We do not know to what extent; these are new matters brought before us and it is difficult for us to say how much time we need in order to give a satisfactory reply. We will be able to say on Friday, if the Court pleases, but then on Friday we may ask the Court for some further time in order to reply to these questions.

Le PRÉSIDENT: Dans ces conditions on peut admettre provisoirement que la prochaine audience aura lieu le vendredi à 10 heures 30. Si M. l'agent se trouve dans l'impossibilité de répondre surtout à la question posée par sir Percy Spender, il s'adressera à la Cour pour demander un délai supplémentaire.

7. REPLY OF Mr. DE VILLIERS

(COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA)
AT THE PUBLIC HEARINGS OF 19 AND 22 OCTOBER 1962

[Public hearing of 19 October 1962, morning]

Mr. President, honourable Members of the Court:

In replicating to the Applicants' Oral statement, I am sure it is not expected of me to deal with each and every one of the points that have been raised in the course of a two-and-a-half day statement, and I do not propose to do so. I do not think it would serve any useful purpose. In many respects our answers to what has now been stated in the oral statements on behalf of the Applicants are fully on record, either in the Preliminary Objections or in the verbatim record of our Oral statement, or in both, and it would really be unnecessary, possibly even odious, to have further repetition in that regard. I will gladly leave the evaluation of those arguments and counter-arguments to the Court. In some other respects also there are arguments with which I will not deal, and where specific answers might not be found on the record; I am thinking, for instance, Mr. President, of such flights of fancy as we had, in the suggestion that where a matter is of crucial importance it ought not first to be dealt with at length at page 345 (I) of Preliminary Objections,—and if it is, that there must be something sinister attached to it; and that so despite the fact that the matter is properly introduced at page 214 of the Preliminary Objections, that that is followed up by a chapter on history up to page 214, and that there then is a development of an argument which serves *inter alia* as a foundation for a proper appreciation of the significance and the implications of the matters dealt with at pages 345 and 346. Really, Mr. President, when we have suggestions of that kind, my attitude is that they carry their own answers within themselves, and that it would be an imposition on the time of the Court to deal with them. So I will leave also those matters aside.

But there are certain questions that do require some attention by way of replication. They fall in different categories. The first large division that occurs is as between matters that are relevant to the issues of jurisdiction and those that are irrelevant. Again, Mr. President, with regard to those that are irrelevant, I do not propose to say much; I am sure that is not expected of me; but I would nevertheless like to say something.

There has been a very obvious attempt at the creation of atmosphere by reference to matters of a tendentious, political and emotional nature. There has been a reading at very great length from reports of various political committees and bodies containing critical comment, and often scandalous comment, about certain aspects of administration of the Mandated territory. That, Mr. President, we found regrettable in itself. But it was the more so in the circumstances of this case, where we are dealing with Preliminary Objections to jurisdiction, where those are

matters pertaining to the merits in regard to which the issue is whether the Court has jurisdiction, and where perforce, under the circumstances, we have been compelled by reasons of relevancy and propriety to refrain from answering those allegations as to their merits as we have stated very clearly on the Pleadings before the Court. In fact, I cannot see what other course we could properly have adopted. But that did not restrain the Applicants. On the contrary, it seems that their attitude was that the victim was now securely bound and gagged, and that it could be pilloried with complete abandon.

That, Mr. President, followed on a number of statements—perhaps I should say misstatements—regarding the historical development of this question. All those misstatements had already been dealt with by us very fully and very painstakingly in Chapter II A of our Preliminary Objections, where we gave chapter and verse for corrections to those misstatements. But those corrections—we find in the oral statements presented—are simply ignored, as if they do not exist; and the original misstatements are again presented as if they were gospel.

All this, Mr. President, appears to have been advanced as a basis and in support of a statement which we find at page 262, *supra*, of the Verbatim record, to the effect that "... efforts to negotiate an end to the dispute ... are now rebuffed by denial of the jurisdiction of this high Court to hear and adjudicate the merits of the dispute". In other words, Mr. President, the Court's displeasure is invited at the fact that we have had the temerity to raise any objections to jurisdiction.

I must say that I am not used to this type of thing in a court of law, and the least I say about it, probably, the better. I would merely like to say this, very briefly. As appears from the record, the Respondent's representatives have often had occasion to point out that criticisms of Mandatory administration have resulted from wrong, and often from false, factual information. Experience has shown that where observers have taken the trouble to come and see for themselves they have almost invariably found that the Mandatory government's version of the facts has proved to be the correct one, and that the version of its political accusers has often proved to be fantastic to the point of being ludicrous. And, Mr. President, under those circumstances, I know that it was a matter of almost temptation to the Respondent Government to forgo objections to jurisdiction and to accept the opportunity of having the facts investigated and recorded by an international court of justice. But then, Mr. President, it will immediately be realized what major difficulties attach to that line of thought, particularly in this respect: that the case as presented on the merits would require this Court not merely to make an investigation into fact; it would also require this Court to pass judgment, as a court of law, on the soundness or otherwise of policies which are applied to those facts. That would be the implications of adjudication on the merits in this case: passing judgment on policies which are in many respects the subject of red-hot controversy, emotional and political, in the international political arena. And, Mr. President, when under those circumstances we ask the Court to forgo jurisdiction on grounds which we submit to be sound, then we do not think that we are thereby doing a disservice either to this eminent Court of law or to the advancement of the rule of law in international society.

I think I have said enough on that subject.

Mr. President, it is almost with a sense of relief that I turn now to matters which could be considered more relevant to the jurisdictional issues before the Court. The first one in that regard is the manner in which the Applicants have sought to represent certain basic aspects of our case. For that purpose, I should like to invite the Court's attention to the Verbatim record at page 261, *supra*, very near to the beginning of the oral statement on behalf of the Applicants. There, my learned friend, Mr. Gross, put the matter as follows:

> "As we understand it, the fundamental and, indeed, the sole, basis for Respondent's contention that the Court should reconsider and revise the 1950 Advisory Opinion is that, again in Respondent's words, 'the question now before the Court is, although the same in form, very different in substance now because of the presentation of new facts...'."

We find a statement very much to the same effect at page 283, *supra*, of the Verbatim, 15 October:

> "It appears that Respondent's entire justification for asking this Court to reconsider and revise the 1950 Advisory Opinion rests upon the contention that certain so-called 'new facts' of 'crucial importance'—I quote—were not known to the Court in 1950 and that, if they had been—again I quote—the Court 'could not possibly have arrived at' its conclusions."

And we find something similar again at page 285, *supra*:

> "It is therefore entirely on the foundation of this contention that Respondent requests the Court to reconsider and reverse..."

On the basis of that, Mr. President, if I may revert to page 262, *supra*, of that record, the Applicants' learned Agent went so far as to say:

> "Under these circumstances it would, perhaps, be sufficient for Applicants to confine our argument to a demonstration that the facts which Respondent has characterized as both 'new' and 'crucial' are, indeed, neither."

Now, Mr. President, it should hardly be necessary for me to emphasize that that is a complete misrepresentation of the case which I did advance to the Court in this particular respect; I can hardly imagine that I could have expressed myself so badly as to be so misunderstood. I will, in answering this representation, also use the phrase "new facts", although, as I have explained before, I am not suggesting that they are new in the sense of first arising after 1950 or that they were not available for use in 1950; but I will use that as an expression which may be convenient in the circumstances—the Court knows what we mean thereby. We have from the start submitted two propositions, and, I think, clearly. We submitted firstly that a Court would never refuse to reconsider a previous Advisory Opinion, except of course where the request should be entirely frivolous or vexatious, and secondly, that it would not hesitate to depart from a previous Advisory Opinion if good reasons should be shown therefor. That we did in the Preliminary Objections, at pages 214 and 215 **(I)**. We put it quite clearly there, and again in the Verbatim record of our Oral statement by my learned friend, Dr. ver-Loren van Themaat, at pages 21 and 22, *supra*. We advanced the

argument in this form; we stated at page 215 (I) of the Preliminary Objections, that the good reason on which we would rely for a departure from the Opinion would be found to rest largely on features of the 1950 proceedings, such as:

> "... the lack of presentation, or of adequate presentation, to the Court of material information of vital importance, factual and otherwise".

Not only a lack of presentation of certain facts, also a lack of adequate presentation, and not of facts only, but of material information, factual and otherwise. Indeed I used a similar description in the Oral statement to be found in the Verbatim at page 33, *supra*. And in the development of the argument, Mr. President, I emphasized repeatedly, and particularly in regard to my argument on Article 7 of the Mandate, the importance of new arguments, as distinct from new facts, which have now been fully presented to the Court, and which were not canvassed at all in 1950. That is to be found in the Preliminary Objections, at pages 368 and 373 (I)—I am not going to read from it now—and again in the Verbatim record of my Oral statement at pages 184-186, *supra*. I emphasized there, for instance, that in 1950 there was no suggestion during the argument of a "descriptive meaning" that could be attached to the phrase, "another Member of the League of Nations" in Article 7, and that therefore it was impossible for Dr. Steyn to deal with that. There was no suggestion of a "carry-over" which might affect the meaning or effect of that expression, and Dr. Steyn could not deal with that. There was no suggestion of a "succession" relative to Article 7 in the arguments in 1950, so it was impossible for Dr. Steyn to canvass and deal with that question. I emphasized the absence in 1950 of the full analysis that is now before the Court of the meaning and the implications of the expression, "Member of the League of Nations" wherever it occurs, not only in our Mandate, but also in the other Mandate instruments and throughout the Covenant of the League. And, on top of it all, Mr. President, if there should still have been any misunderstanding, I made a very express statement on this subject on the 5th October, to be found in the Verbatim on page 133, *supra*. This was at the conclusion of the argument relative to the suggested succession concerning Article 6. I stated there:

> "I have in this regard stressed the importance of the facts which have now been placed before the Court, and which were not before the Court in 1950 ... Where I have stressed that, I must not be taken to suggest that, had it not been for new facts or new information, it would not have been competent for this Court to depart from a conclusion earlier arrived at in an advisory opinion. It would certainly have been competent for the Court to do so, and I submit that if the Court was satisfied, that justice required it to do that, it would not hesitate even in the absence of any new information. But I submit that in this case it would be much easier for the Court to come to its own conclusion because of the fact that there is this new information which in substance makes the task of applying the law to the facts in this regard a different one from what it was in 1950."

That has always been our attitude, and it still is, Mr. President, with the greatest respect. We submit that, even if there had been no new fact at all, then on a reconsideration of the matter on its merit, the Court, with respect, will come to the conclusion that we contend for. But we do contend, and I maintain the contention with even more emphasis than before, that there are these vital new facts, this vital information—factual and otherwise—but particularly relating to factual information which was not placed before the Court and the significance of which could therefore not be dealt with in argument, or considered by the Court in its deliberations—which considerations, in my submission, make the task of applying the law to the facts substantially a different one from what it was in 1950.

The Applicants, as a result of this wrong conception of our argument—this wrong presentation of the basic aspects of our argument—have limited themselves to a very narrow basis of replying to that argument. That does not hurt me, Mr. President; my argument stands on record in regard to both of its aspects in its full perspective, that is on the one hand, relative to these new facts and, on the other hand, based on full reasoning on merit in support of the conclusions for which we contend. But, on the contrary now, we find by way of contrast that the Applicants' Oral statement has, in effect, been limited to an attempt to knock out these new facts, as my learned friend called them, an attempt which in my submission, as I shall endeavour to show, failed lamentably. The Applicants' argument is confined to that, and for the rest, my learned friend refrained almost entirely from even attempting to meet any of the arguments on the merits of the questions before the Court. My learned friend, Mr. Gross, did promise, at the start of his argument, that he would endeavour to show, and I quote his words in the Verbatim of 15 October, at page 263, *supra*, "that Respondent's arguments *de novo* lack merit and should be rejected". I stress, he would endeavour to show that Respondent's arguments *de novo* lack merit and should be rejected. But that resolution, Mr. President, seems to have wavered the nearer it came to the actual event. Because we find on 15 October, at page 283, *supra*, that my learned friend set out the three propositions which he would endeavour to establish, and the third one reads as follows: "Respondent's *de novo* argument is in conflict with the Advisory Opinion, is not sound, and should be rejected." So the further element introduced is: "in conflict with the Opinion"; but still we find: "is not sound, and should be rejected". And then, Mr. President, when it came to the actual event on 16 October where this third heading was to be dealt with, what do we find at page 310, *supra*? We find it now put in this form:

> "I turn now to the third major proposition which relates to the Respondent's *de novo* argument, and which submits that the Respondent's *de novo* argument, on the merits, is in conflict with the Advisory Opinion and should be rejected."

No further reference to being unsound, to lacking merit, but purely that it is in conflict with the Advisory Opinion and should be rejected. Mr. President, this is not a mere mistake in recording, and it is not a mere slip of the tongue; because if we analyze under that heading what was said in support of this third proposition, we find that the whole portion of the argument was devoted almost entirely to a comparison of our

argument with what was found or held in the Opinion, and to point out points of conflict in that regard, imaginary and real. And it ended up on this note, towards the end of that exposition under the third heading on 17 October, at page 319, *supra*:

"We do not bear the burden of sustaining the validity of the Opinion of the International Court of Justice."

Not a single argument addressed to the merits of our contention, attempting to meet them in any way. After all the drum and fife at the start, Mr. President, really one could hardly imagine such a complete anticlimax. Certainly in my experience I have never come across anything of the kind.

Mr. President, I turn next to the Applicants' argument concerning the so-called "new facts". It will be my endeavour to show that even on the artificially narrow basis which the Applicants chose for attempting to meet our case, they have failed completely to break down the important material on which we rely, even the important "new facts", as they so narrowly conceived them and dealt with them. My contention will be that, on the contrary, after this abortive onslaught of the Applicants upon those "new facts", the material stands confirmed with even more vigour and significance than before.

The Court will recall that we listed four factors in the Preliminary Objections, at pages 345-346 (I), and that that listing served as a basis for dealing with the matter by the Applicants' Agent. The fourth factor is really a group referring to practice of States, and it was amplified later in the verbal statement on behalf of the Respondent on 5 October, by what one might almost call a fifth group, also under the heading of "Practice of States". It is an analysis of the attitudes of Members of the United Nations over the years 1947 to 1949 specifically regarding the South West Africa question. That, then, is the basic list.

Now, as far as the first factor at page 345 (I) of the Preliminary Objections is concerned—the express reservation at San Francisco, on behalf of Respondent—the Court will recall that in my Oral statement I virtually abandoned that in so far as its significance as a "new fact" was concerned. My learned friend, in reply, had a good deal of fun on the question why it should suddenly now cease to be of importance. The answer, of course, is simple. The point never ceased to be important as a factor in our argument on the merit—in other words, as a factor militating against any tacit understanding on the part of the United Nations founders that there would be a transfer of powers of supervision from the League to the United Nations in regard to unconverted Mandates. In that sense, the matter still remained of importance, and I dealt with it and emphasized it in that form in the Verbatim at page 78, *supra*. The Court will find the matter dealt with there, I need not read it. It was only as regards the newness of the point—the difference between what was before the Court in 1950 and what is before the Court now—it is only in that regard that I, as Counsel, did not feel that I could impress the Court with the importance of that difference; because what was before the Court in 1950 already implicitly contained what was explicit in the further portion quoted in the footnote at page 238 (I) of the Preliminary Objections.

That is the answer, of course, to all this play on the question why the matter had ceased to be important. I do not begrudge my learned

friend the bit of fun he had in this regard—he certainly needed some reward for all his pains—and I will make him a present of that one. But then, he must not take it amiss when I say that this was the very last one of the so-called "casualties in the campaign for revision", if I may borrow his phrase. In respect of all the other "new facts" he had no success whatsoever, as I shall endeavour to demonstrate.

He did claim success in regard to the second factor, but that is completely illusory—the second factor being, and I read from our Preliminary Objections at page 345 **(I)**:

> "The rejection by the Preparatory Commission of its Executive Committee's proposal for a Temporary Trusteeship Committee, without substitution of anything regarding possible transfer to, or assumption by, the United Nations of any 'functions under the Mandates System'."

Mr. President, we had never advanced this particular subject as being important purely in so far as a proposal for a Temporary Trusteeship Committee was concerned, and the rejection of that proposal by the Preparatory Commission. The importance lay in the adjunct to that proposal, the adjunct namely, that there was to be something express about a possible transfer of functions *regarding Mandates;* that there was to be an investigation by this Committee of possibilities in that regard. so that here there was a proposal for express provision on that point; That has always been the brunt of this point which we advanced, which we said the Court was not made aware of; and that, in the totality of factors bearing on the question of intent, is an important factor. But that was not how the matter was presented to the Court by my learned friend when he dealt with it in his argument. But before I come to that, may I just, in support of what I have stated, refer the Court to the passages where we dealt with this matter, and refer to the way in which it was put there. First, in the Preliminary Objections at pages 327-328 **(I)**. At page 327, the Court will see under the heading *(d)* there is a reference to a portion of the Executive Committee's report which dealt with the establishment of the Trusteeship system:

> "It will be recalled that a recommendation was made therein for the establishment of a Temporary Trusteeship Committee, one of whose functions would be to 'advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates system'."

And then we go on to say that that proposal was rejected in the Preparatory Commission,

> "... and no other proposal regarding investigation of, or machinery for, the possible 'transfer to' or 'assumption by' the United Nations 'of any functions and responsibilities hitherto exercised under the Mandates system', was substituted for the rejected proposal".

That was the brunt of the point. And we find it dealt with as follows in the argument at page 328 **(I)** of the Preliminary Objections, about one-third down the page:

> "A specific proposal envisaging investigation and recommendation concerning possible 'transfer' of 'functions ... under the Mandate system' was rejected and nothing substituted for it."

We find the matter dealt with in the same way in our Oral statement in the Verbatim. We find at page 81, *supra*, the matter is put with reference to the proposal for a Trusteeship Committee and with the function to advise the Assembly about this possible transfer. And the comment in the argument is:

> "So here, then, was a specific, express proposal to do something in regard to the possible transfer to the United Nations of functions of the League regarding mandates."

That is the way in which the argument is developed there. We find the same thing at page 82, *supra*:

> "The mere fact that there was such a proposal shows that there was a contemplation that if there was to be a transfer of functions in this regard it would have to be specially provided for."

And then, particularly significant is the statement at page 102, *supra*:

> "The point on which we rely is that there was in this history of resolution XI a specific proposal for express provision in regard to arrangements for a possible transfer of functions, but that that express proposal could not muster support..."

So, Mr. President, it is no answer then to that argument to say that from Dr. Kerno's statement the Court knew that there had been a proposal for a Temporary Trusteeship Committee and that that proposal was not adopted. That is no answer at all. That is quite obvious, and I need not labour the point. The way in which the Applicants' learned Agent dealt with the matter on 15 October was to omit any reference to that aspect of the matter, to the aspect of a specific proposal for a possible transfer of functions. He referred to this point as if its complete significance lay in a proposal for a Temporary Trusteeship Committee and in the rejection of that proposal. We find that at page 289, *supra*, of the Verbatim for 15 October, and I quote from the fourth paragraph:

> "Now this second new fact, Mr. President, concerns the rejection by the Preparatory Commission at London of its Executive Committee's proposal for a Temporary Trusteeship Committee",

using virtually the same words as at page 345 (I) of our Preliminary Objections, but stopping short of the crucial portion; and then the statement continues:

> "Respondent comments, at page 345 of the Preliminary Objections, that such action, and I quote, 'negatives a tacit intention...'."

We never presented that as the action that would negative any intention.

The claimed success was therefore no success at all. I wish to apologize to the Court for not mentioning the fact that to that extent the matter was mentioned in Dr. Kerno's argument. I was not aware of it as Counsel; certainly the members of my team were; they realized it was not important for argument. Still, if I had known I would have mentioned

that fact, but it does not affect the essence or the substance of the argument in the slightest.

Mr. President, in regard to the last point, I am reminded that study of the documentation in 1950 shows that the report of the Preparatory Commission was not put before the Court. The only information the Court was given regarding the proposal for a Temporary Trusteeship Committee and the rejection thereof, was the bald statement in the late Dr. Kerno's argument.

I pass then to Applicants' argument concerning the third of the so-called new facts, that is the fact regarding the original proposal by China at the last session of the League Assembly. Here, Mr. President, my learned friend did not even claim success in the sense that he could knock this out as a new fact. On the contrary, in the Verbatim record at page 297, *supra*, he made the admission that "it is clear that two of them were not specifically referred to", this being one of the "two of them" of which he was speaking. But my learned friend did try everything in his power to discredit this argument, this factor, in other ways. In my submission, each one of those attempts failed completely in its purpose of robbing this factor of its value and its significance, whatever value the points raised by him might have had in other respects. So, for instance, the first two points which my learned friend raised, were entirely technical. They are to be found in the Verbatim of 15 October at page 291, *supra*.

The first one was that this proposal was never formally introduced and voted upon, and that it was thus wrong technically to speak of it as something that was "withdrawn". Well, Mr. President, I make my learned friend a present of that point also. That is quite correct. It was never formally introduced, it was never formally withdrawn. Where we said "it had to be withdrawn because it could not muster sufficient support", it would have been more correct to say "it could not be proceeded with and another one had to be substituted for it". But the argument remains the same. I don't know what success my learned friend claims from that point. I notice, incidentally, that when I put the argument in the Oral statement in the Verbatim at page 97, *supra*, I used the expression "it could not be adopted". So it does not seem that that point raised by the Applicants could affect the value of this factor as we rely upon it.

Secondly, at the same place, at page 291, *supra*, the second technical point was that there was no citation of a document at page 253 (I) of our Preliminary Objections where the text of this proposal was set out. Mr. President, that as a statement is quite correct. But how far it brings the Applicants, as a point of substance for the purpose of discrediting this factor, I don't know. What actually happened in that regard was this. What we had, and from what we quoted in the text at page 253 of the Preliminary Objections was a document in our files. It was an informal document, it was a copy of draft minutes obtained at the last session of the League by our Representative there and that we still had in our records. But it was not an official document which we could file with the Court. We made attempts even before the filing of our Preliminary Objections, and again renewed them at that stage, to get a formal document which we could file. Eventually we had success with the assistance of the Secretariat of the United Nations. They obtained a photostat for us of the original from the archives of

the League at Geneva, and they forwarded that directly to the Registrar of this Court in January of this year. In the meantime the Registrar had made his own enquiries with us and with United Nations Agencies for purposes of having a document for translation. We were under the impression that the forwarding of the document at our request by the Secretariat to the Registrar would comply with our duty of formally filing the document. The Registrar however took the document to have been forwarded merely for his purposes of translation, and that apparently explains why the document was not forwarded to the Applicants as something that had been formally filed by us. We didn't realize that; we only gathered that during the statement by my learned friend in Court—on 15 October. We rectified the matter immediately afterwards, on the next day, by a formal letter under cover of which we submitted a photostatic copy of the document and the document is now properly filed. The Registrar on 16 October explained the matter to the Applicants in a letter of that date. So I hope that that position is fully cleared up. I don't know why my learned friend raised it in the first instance. Perhaps it was quite fair to raise the query: but if he had had difficulty about it I don't know why it was not raised in the first instance in the Observations. At that stage the Applicants did not appear to have any difficulty in this regard, because they accepted—at pages 431-432 **(I)**—the fact of there having been such a proposal and they had no difficulty about the text. In fact they said at the bottom of page 431 of the Observations: "The facts concerning the Chinese proposal were before the Court in 1950"—a statement of course which they could not substantiate, but nevertheless that was the attitude then adopted. If the matter had been raised then it could have been cleared up much earlier.

I may add that the text as we have it at page 253 **(I)** of the Preliminary Objections, appears also in a United Nations document which was filed by the Applicants in support of their Memorials. It was document A/C.4/185, setting out a speech by Dr. Dönges in 1951, and that speech contains a full quotation of the proposal as we set it out at page 253 of the Preliminary Objections. It is referred to in the Memorials at page 93 **(I)** in a footnote. But of course there it may be said that the source was secondary—the source was the same as we had for the citation at page 253 of our Preliminary Objections. In any event, the original is now on record, and I don't know that anything further arises from that point, except that the technical complaint has now shifted to something else, and that is the so-called discrepancies between the text quoted at page 253 of our Preliminary Objections and the photostat before the Court as obtained from Geneva. Mr. President, in fact, if one looks closely at that photostat one will find that there is no discrepancy. Corrections were made in ink to this document, which, as we know, was a *draft* Minute, and every time my learned friend refers to a discrepancy, we find that really the discrepancy is removed by the ink note; the ink note apparently being intended to be a correction. So, for instance, in the very first line which reads: "The Assembly, considering that the Trusteeship Council", the correction inserted in ink is "of the U.N.". That is one of the so-called discrepancies. In the third line there is the word "transferred" in the original text which is altered in ink to "transformed". The one to which my learned friend drew attention was "after dissolution of the League" which was not contained in the second paragraph, but that we find in the photostat is also inserted in ink. So if we

take into account these corrections in ink, we find the two are exactly the same. I don't know what point arises in that regard as far as the discrediting of our argument relative to this particular matter is concerned.

Those, then, were the first two, or shall we say three points in regard to this particular matter.

The next point of attack was to call into question our statement that this proposal "had to be withdrawn", or shall we now correctly put it, could not be proceeded with, and another one had to be substituted for it *"because it became plain that certain of the parties would not agree thereto"* —this last portion of the statement is drawn into question by my learned friend; we find that in the Verbatim at page 292, *supra*. And, he said, there was "no citation" at page 346 **(I)** of our Preliminary Objections for that statement. Of course there was no citation, Mr. President, but the statement is not unmotivated; it relates back to the full argument which we presented to the Court in that respect in the Preliminary Objections at pages 329-332 **(I)**, where we dealt fully with all the facts of the matter, with all the comparisons that are significant, and where we pointed out that there is no other inference that could be drawn from the circumstances but this one, namely that the original proposal could not have mustered the unanimous support which was required for a League resolution.

I do not have to cover that ground again; I did do so in my original oral statement, on 4 October. It will be found in the Verbatim of that day at pages 83-84, *supra*, where I covered that ground, and I think I covered it fully.

Salient features, Mr. President, are these: in the first place, when we make that statement we do not do so as an outside observer who knows nothing of what took place. South Africa was represented at the last Assembly of the League, and our representatives know what took place. When they say there were negotiations, they know there were negotiations. But we do not have to rely purely upon what they say, we can refer to the text of the record and the statement by Sir Hartley Shawcross as cited in our Preliminary Objections at page 254 **(I)** where, in seconding the ultimate proposal which became the Assembly's resolution, he said that the proposal

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

Surely, Mr. President, from that alone it becomes clear—if we compare the resolution as adopted with the original proposal, tentative proposal, contained in the original Chinese draft, it becomes clear that resulting from discussions and consultations there had to be a switch from one proposal to another. If we compare the two one finds that the elements that were eventually omitted were the very elements pertaining to a possible transfer of League functions relating to Mandates, and the inference then becomes clear that there must have been opposition to that aspect of the original proposal.

But we do not have to leave the matter there. We can have regard, as we do in this argument, to the various circumstances which pertained to the different Mandated territories and to the various Mandated Powers. From that there arises a very strong probability that those Powers would

not all have assented to a proposition like that contained in the original Chinese proposal. We know what those various circumstances were from the statements that had already been made at that stage on behalf of the various Mandatory Powers. We know, for instance, in the case of the United Kingdom that it had declared at the United Nations that it was willing to place the territories Tanganyika, the Cameroons and Togoland under the United Nations Trusteeship System, but subject to the negotiation of satisfactory terms. That we find in the statement as cited in the Preliminary Objections at pages 246 and 250. Page 246 relates to the statement at the United Nations, and page 250 to the statement at the last session of the League.

In the case of France, its statement relative to the Cameroons and to Togoland—its willingness to place those territories under United Nations trusteeship—was qualified with reference to the approval of the peoples of the territories. That we find in the Preliminary Objections at pages 246-247 **(I)**, and again at page 251. So there were, even in those respects, contingencies.

We find that in regard to Palestine, the United Kingdom had made it perfectly clear that the future of that territory was reserved for the time being, and that nothing definite could be stated about plans for the future, or about intentions. We find in the case of South West Africa the Union had stated its intention of seeking recognition for incorporation in the Union. And we find that in the case of the former Japanese Mandate in the Pacific the Mandatory was not even represented at the last session of the League. We find also that, in regard to the Palestine Mandate, there was eventually a reservation by the representative of Egypt. This reservation is cited in the Preliminary Objections at pages 254-255 **(I)**, and it reads:

> "The opinion of my Government is that Palestine has intellectually, economically, and politically reached a stage where it should no longer continue under mandate or trusteeship or whatever other arrangements may be considered... It is the view of my Government that mandates have terminated with the dissolution of the League of Nations, and that, in so far as Palestine is concerned, there should be no question of putting that country under trusteeship."

So it does not seem probable that the representative of Egypt could, under those circumstances, have supported the original Chinese proposal.

We take into account further, Mr. President, the actual statements made on behalf of Mandatory Powers to the organs of the League, to the League Assembly, all of which avoided any reference whatsoever to reporting and accounting after dissolution of the League, and some of them, as I have dealt with before, very pointedly indicated that there would be no such reporting and accounting.

So, under all those circumstances, it becomes absolutely clear: the only inference that can be drawn is that the original proposal could not be proceeded with because it would not have mustered unanimous support.

Those arguments are not dealt with by my learned friend—he does not attempt to meet them at all. He refers instead to the gratification expressed by the representative of China, and he says that would not have been possible if the representative of China had had to beat a retreat on a point of principle. Now surely, Mr. President, I don't know why anybody should think that he had to beat a retreat on a point of principle

when there is a requirement of unanimity for a resolution, and after negotiation he finds that certain aspects of an original proposal are not acceptable to other delegates, and eventually they arrive at an agreed solution which pleases everybody, and which he then proposes—the representative of China still being the proposer of the agreed draft eventually. I have never heard that the expression of gratification on an occasion of that kind could serve as a basis for the drawing of an inference in the teeth of such cogent and conclusive evidential material as I have referred to.

The fifth point, Mr. President, of attack on our argument in regard to the history regarding the original Chinese proposal, is that it seems incredible that Dr. Steyn would not have raised the matter, if he had known about it, and that he must therefore have considered it unimportant. Now, we all have the highest respect for Dr. Steyn's competence; but I don't know why this Court should be asked to decide the value of any particular consideration with reference to what Dr. Steyn may or may not have thought of it as Counsel, if he knew of it. There is no basis whatsoever on the record for inferring that Dr. Steyn must have known; and as to the value which he attached to it, Mr. President, all I can say is that we know that he addressed a committee, the *ad hoc* Committee, of the United Nations on this subject on 9 July 1951, and I quote from page 9 of the document A/AC.49/SR.7 of 17 October 1951:

> "He [Dr. Steyn] then referred to the history of the resolution submitted by the Chinese delegation to the League, which contained a specific proposal that the League's function of consideration of reports should pass to the United Nations. When first submitted, the Chairman had ruled the resolution technically out of order at that stage. As a result of subsequent informal discussion of the resolution, in which South Africa had indicated that it could not support it, it had been redrafted in a considerably different form and the references to the consideration of reports had been deleted. Events connected with the consideration of that resolution appeared to provide a definite negation of the idea that the supervisory powers were to pass to the United Nations and it would appear that the League had left the question to the declared intentions of the mandatory powers and to possible subsequent agreement by them with the United Nations."

It does not look as if he then regarded this as unimportant, Mr. President.

I conclude, therefore, Mr. President, in regard to the third of the so-called "new facts", that the Applicants' onslaught in their verbal statement failed completely; the technicalities boomeranged and, as a matter of substance, our argument stands confirmed stronger than ever before.

I proceed to the fourth of the so-called "new facts", the group under the heading of "Practice of States". Here, the Applicants' learned Agent advanced three arguments which are to be found in the Verbatim at pages 295 and 296, *supra*. The first and the third of these have a point in common, relative to Article 80, paragraph 1, of the Charter. I will, therefore, deal with them together, after a reference first to the second, of which I can dispose fairly quickly. The second was to the

effect that, for purposes of construing the Resolution of 18 April 1946 of the League of Nations General Assembly:

> "... it does not appear how statements made one or two years later in the United Nations General Assembly could help overcome the clear fact of statements made contemporaneously with the League Resolution of 18 April 1946". (P. 10.)

Now that rather puzzles me, Mr. President, I don't know which contemporaneous statements made in the League Assembly in April 1946 are intended to be referred to. Does my learned friend mean the statements which indicated the intentions of the Mandatory Powers as to the future? Because, if so, there is no conflict whatsoever involved. Those statements intimated as clearly as could be that there would, in the interim, be no reporting or accounting. Perhaps my learned friend has in mind the gratification expressed by the Chinese representative. If so, then that is a rather flimsy basis for suggesting a conflict. He does not say anywhere what those contemporaneous statements are that he refers to. So we pass on to his first and his third contentions in this regard.

The first was stated at page 295, *supra*, of the Verbatim and it is put in this way; I had better read the wording so as to make sure I have its true significance:

> "In the first place, Respondent's contention or conclusion with regard to the significance of this fourth point ignores the weight which was given by the Court in its Advisory Opinion to the significance of Article 80 (1) as confirming the intent of the authors of the Charter of the United Nations that there should be a continuance of United Nations supervision over Mandates."

That appears to be the first point, and it goes on to say:

> "This is of course expressly the interpretation of the Court in its Advisory Opinion. Respondent, in its argument, does not consider it even relevant enough to refer to Article 80 (1) in this connection."

The third point we find at page 296, *supra*:

> "Thirdly, the contention that the United States policies supported Respondent's thesis verges on the ironic."

Then there is a discussion with reference to the leadership taken by the United States in the formulation, the steering and the adoption of Article 80 (1): and the contention in this regard, if I understand it correctly, is that having regard to the action there taken by the United States in regard to Article 80 (1), the statement later made in the debate on Palestine to the effect that the United Nations did not stand heir to the League responsibilities regarding Mandates, should be regarded as being in conflict with the policy adopted by the United States relative to Article 80 (1), and that that conflict should be resolved on the basis that the later statement should be regarded as something said in a highly politically charged debate, and therefore ruled out of the picture. I do not understand that form of reasoning, Mr. President. There is a distinction in the first place between the significance which my learned friend in his argument attaches to Article 80 (1) of the Charter, and that apparently attached to it by the Court in 1950. I will

deal with the Court's interpretation and use of that Article at a later stage. Let me refer first to the Applicants' Agent's use of that Article. He regards the Article apparently as resulting in a position that there should be a continuance of United Nations supervision over Mandates. Well, perhaps one should paraphrase it to say that there should be a continuance of supervision over Mandates, and that that should now be by United Nations agencies instead of League agencies, and that there should be an obligation on the part of Mandatory Powers to submit thereto. That would really be a proper statement of the proposition. Of course, Mr. President, Article 80 (1) does not say anything of the kind. It is, and it purports to be, nothing more than an interpretation clause, affording a guide to the interpretation of a certain chapter of the Charter. It says that:

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

Mr. President, we have a reference, at pages 269 and 270, *supra*, to the history and the role played by the United States in this regard, and on these pages we find that the Delegate stated as follows (and this, as I understood it, was particularly relied upon by the Applicants):

> "The Delegate for the United States stated that paragraph B. 5, was intended as a conservatory or safeguarding clause. He was willing and desirous that the minutes of this Committee show that it is intended to mean that all rights, whatever they may be, remain exactly the same as they exist—that they neither increased nor diminished by the adoption of this Charter."

Mr. President, in this whole explanation those still remain the key words. It does not appear that the United States made itself a party to this magic interpretation now attempted to be placed upon the Article by the Applicants. And if we accept that simple premise, that the United States Delegate did not consider that this Article could be applied outside its apparent scope and object, namely, to serve as a means and an auxiliary measure for the interpretation of the Charter, if we accept that basic proposition, then there is no conflict at all between the attitude adopted by the United States at that stage—the adoption of Article 80—and at the later stage to which we refer in our argument on the practice of States. Then it becomes quite unnecessary to try to explain away what was stated later on the rather unworthy basis of something said in the heat of a highly politically charged debate. When we read the statement, Mr. President, at page 337 (**I**) of the Preliminary Objections, it does not seem to me there was much heat in this statement. The statement was that "the United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The record seems to us entirely clear that the United Nations did not take over the League of Nations Mandates system." Nor, Mr. President, could we

detect much political heat in the statement by Mr. Gerig, to which we have already referred and which is to be found in the Verbatim at page 127, *supra*, if I remember correctly, in the Trusteeship Committee dealing with the question of South West Africa. He stated:

> "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present Mandate, admitting that it exists."

I do not think my learned friend need be so concerned about the prospect that the United States in 1945 and 1946 had a view of Article 80 (1) which did not extend it beyond its apparent scope and object.

Mr. President, I said we are to distinguish between the Court's contemplation in regard to Article 80, paragraph 1, and the interpretation sought to be placed upon it by our learned friend, on behalf of the Applicants. That interpretation, which attributes to the Article an effect upon existing rights as safeguarding or protecting those rights also against events outside of the adoption of the Charter, that interpretation would make the effect of the Article run counter to what it says, and it would run counter to the explanation given by the representative of the United States, when he said that it was intended to mean that "all rights whatever they may be remain exactly the same as they exist—that they are neither increased nor diminished". If, for instance, Mr. President, there should be a right which would terminate for some cause or other outside of the adoption of the Charter, for instance a period of time which would bring effluction of the right, or an agreement *inter partes*, or something similar; if then, Article 80 should have the effect of nevertheless keeping that right alive, then Article 80 would not be maintaining rights exactly as they were, exactly the same as they existed: it would be changing the existing rights. It would then have the effect that, despite a cause inherent in the right itself which brings it to an end, this clause nevertheless keeps it alive. That would be changing the right, and it would be changing the corresponding obligation pertaining to that right. And, therefore, that interpretation would run counter altogether to what any basis of interpretation of the Article might justify.

Mr. President, my learned friend went so far, if I understood him correctly, to say that the mere fact that the Court referred four times to Article 80, made its significance very much more than it would have been otherwise. I really do not understand that kind of magic, and that is why I said I distinguished between the use which my learned friend tries to make of the Article and the use which the Court appeared to have in mind.

The Court, if I understand correctly the Opinion of 1950, had this in mind. It referred not to the express provisions of Article 80, because it emphasized in that regard that the clause merely says that nothing in Chapter XII shall be construed to affect existing rights or instruments. It emphasized that. But the Court went on to refer to what the Article

could be taken to have presupposed. There was the conception of a presupposition. The Court apparently had this in mind, that all this trouble to protect the rights against the effect of the adoption of the Chapter would not have been taken if there had been a contemplation that those rights in regard to Mandates would come to an end with the dissolution of the League. And therefore, that indicated a probable contemplation firstly that Mandates would survive the League. And the Court went further when it referred to the Article again. On the basis of that presupposition the Court went on to argue that there was a probability of a further contemplation that if Mandates were preserved, then supervision over Mandates would be preserved, otherwise the rights would not be effective. And that is all. The Court referred to nothing more than what it regarded to be a general consideration of probability: that is therefore a factor to be weighed in conjunction with all other factors, of probability and otherwise, which bear upon the relative intent of the contracting parties, being in this case the authors of the Charter. In that sense then, the factor is met by the argument which I have adduced to the Court: the reliance placed by the Court on Article 80, paragraph 1, is met by the other evidential material which directly indicates what the actual intent in this regard was.

[Public hearing of 19 October 1962, afternoon]

Mr. President, before I continue with the argument, I have a correction to make, with apologies. It appears that there was yet another misunderstanding about the photostat copies of the original draft Minutes of the League containing the original Chinese proposal. I referred this morning to corrections in ink. They were, in fact, on the copy before me and we had assumed that that was the way in which the photostat had been received from Geneva and that the corrections had been made there by some official for minuting purposes. It appears now that in fact those alterations in ink were made in this building by an official for translation purposes, and that it is on only some of the photostat copies and not on the others. It is not on the copy which was submitted to my learned friends for the Applicants, and that is why they were not aware of it. Of course that means then that there *are* slight discrepancies between the copy that was in our possession and the copy that we have obtained from Geneva. My learned friend himself indicated in his argument, he admitted, that they were completely insignificant, they did not affect the meaning or the significance of the text. They are probably to be explained on the basis of corrections made at various stages of minuting of what took place. That is the only inference one can draw from that aspect of the matter. My learned friend dealt with the matter in the Verbatim at page 317, *supra*, where he admitted quite frankly that no significance can be attached to any of the differences.

I revert, then, to our replication to the Applicants' argument concerning the fourth new fact—so-called—the Practice of States. I had dealt before the adjournment with the three arguments advanced by the Applicants in that regard and I hope that I have demonstrated that they are entirely without merit.

The first one referred to a conflict, a so-called conflict, between the attitudes adopted by States in the years 1947-1949, and something that

would have been said contemporaneously with the League Resolution in 1946. What that something was that was said contemporaneously we don't know; it is a mystery.

As regards the other two arguments—the first and the third—they concern a suggested conflict between Article 80, on the one hand, and the attitudes adopted by various States in the years 1947-1949 on the other hand. But again, Mr. President, that suggested conflict arises only on this highly artificial and, in my submission, erroneous meaning attempted to be assigned to Article 80 by my learned friend. On the assumption, the very natural and reasonable assumption, that that is not the meaning assigned to it by the States in question, then all suggestion of inconsistency or contradiction in that regard falls away. That is the logical and the reasonable way of explaining away this suggested inconsistency in that regard, because in fact there was none.

The only other comment that my learned friend had in regard to this fourth new fact—the Practice of States—was in regard to the Special Committee's Report on the Palestine Mandate. He suggested in the Verbatim at page 297, *supra*, that the language of the report on which I relied was in some way or other "vague and contradictory". Now, Mr. President, I am not going to read that language to the Court again. I think it would be presumptuous on my part to attempt to demonstrate to the Court how clear and how unambiguous that language in fact is, and how precisely it accords with the submission I am addressing to the Court on behalf of the Respondent as to what the legal situation was in the interim period regarding possible supervision over Mandates. It is in exact accordance, and my learned friend has not attempted to indicate in what respect he suggests that there could be said to be any element of vagueness or contradiction about it.

He said further, at page 297, *supra*, that:

> "The Palestine Committee recommended that Palestine be granted independence and that, in the interim, the United Nations should supervise the Mandate."

And his comment was:

> "The Committee was obviously without the slightest doubt concerning the competence of the United Nations to exercise supervision over Mandates."

Mr. President, that, of course, does not follow in the least. As appears from the report itself, as cited in the Preliminary Objections, and as is a well-known historical fact, the United Kingdom had voluntarily submitted the matter of Palestine to the United Nations for action in terms of Article 10 of the Charter. And what was being recommended by the Committee would, if accepted, become a recommendation of the General Assembly, which again would have to be considered by the Mandatory Power, the United Kingdom, and would have no binding effect whatsoever. How that could be said to demonstrate not the slightest doubt concerning competence to exercise supervision over a Mandate is a mystery to me. The report of the Committee is referred to in the Preliminary Objections at pages 335-336 (**I**), and at the top of page 336 one finds stated in the report: "The mandatory Power has itself now referred the matter to the United Nations."

Mr. President, I conclude then that as regards this fourth factor nothing has been advanced from the side of the Applicants to cast the least doubt or to impair in the least the weight to be assigned to this factor—the weight to be assigned to the clear, unequivocal attitude stated and adopted very shortly after the period of transition in the year 1947 by fourteen States, Members of the United Nations, most of whom had been League Members.

We come then to the fifth factor—the attitude expressed by Members of the United Nations specifically on the South West Africa question over the years 1947-1949, before the Advisory Opinion of the Court, and very shortly after the period of transition. In this regard my learned friend dealt with the matter, as recorded in the Verbatim at page 298, *supra*, and he tried to pass off the statements made by the various States in this regard as "vague, inconsistent and contradictory". He ascribed that language to me, he said he got it from me, that I had used that description. I had used it, yes, but not for the statements of the States in general. I had used it only in regard to the attempt on the part of five States during the years 1948 and 1949 to find some basis on which they could say that there was an obligation on the Union of South Africa to submit to United Nations supervision in respect of a Mandate which had not been converted into Trusteeship. That is to be found in the Verbatim at page 132, *supra*, which very clearly demonstrates that that was the only aspect of the matter in respect of which I had used that language.

My learned friend seeks not only to apply that language to all the attitudes and all the statements and all the views expressed over those years by the various States, as I relied upon them, but he added another description; he described them as "often shifting". Mr. President, he did not attempt to demonstrate how those descriptions apply to these statements on which I placed special reliance. There was nothing vague about the 1947 position, when the representatives of the Union of South Africa clearly and unequivocally stated their understanding that there was to be no United Nations powers of supervision in respect of the Mandate, and when there was not a single contradiction from any State despite the fact that 42 of them took part in the various debates on the subject. There was nothing vague or contradictory or shifting in that position.

There was nothing vague, or contradictory, or shifting in the position of 25 States, including the Union of South Africa, who, over the years 1947, 1948 and 1949, clearly expressed the same understanding that there was, outside of a Trusteeship Agreement, no obligation to submit to supervision, no legal obligation, and no power of supervision on the part of the United Nations in that respect. Nothing vague, nothing contradictory, nothing inconsistent or shifting. My learned friend again did not attempt to show how that language could in the least be said to be applicable to these cases.

I had, in my oral statement, read those particular statements to the Court, I had given full references to the United Nations records, I provided an index for the purpose of checking on us, checking on our classifications and seeing whether they were fair, and we get no reaction to that at all; the only reaction we get is the applying of these epithets, the misapplying of them as if they had come from me.

So this fifth factor, Mr. President, in my submission, also stands completely unaffected by the argument to which we have been listening.

Finally, before leaving the subject of the so-called "new facts", the Applicants made two general submissions in that regard in their oral statement. The first one is contained in the Verbatim at pages 299-300, *supra*, and, if I understand it correctly, it rests on two legs. The first one is that the significance of the new facts as we advance them lay in the premise that the Court's finding in 1950, concerning United Nations succession to the League functions regarding Mandates, was based on a tacit intent on the part of United Nations Members, and a corresponding tacit intent on the part of the League Members at the time of its dissolution. Now that is perfectly correct—that is a correct appreciation of our argument in that regard. We advanced those new facts as being of special significance in that regard, because they refute any such suggestion of tacit intent. And they are even of the utmost importance if there should be any suggestion of a tacit intent that originated at the time of the foundation of the League and of the Mandate system; because if there had been such a tacit intent—something that was so clearly understood that it did not have to be recorded—then it would surely have been brought to mind at the pertinent time of transition in 1945 and 1946. But now my learned friend goes further in his argument, and he says his interpretation of the Court's Opinion on that point is that it did not rest on a finding of such tacit understanding or consent, and that is where we come into issue with each other.

Now what does he say in support of this statement, that the opinion did not rest on tacit consent? I read from page 299, *supra*. It says there:

> "The 'general considerations', as the Court itself describes them in its Advisory Opinion at page 136, which in fact underlay the Court's conclusion, proceeded from the very legal nature and legal consequences of the Mandate institution itself."

Now what that means, Mr. President, if not related to a question of the intent of the parties that founded the institution by their agreement, I don't know—unless the idea should be that there is something of the nature of a principle of customary international law involved, or a general principle of law recognized by civilized nations—I don't know—that is not explained. It is "the very legal nature and legal consequences of the Mandate institution itself", this novel institution which was then for the first time brought into existence by international convention.

We find some explanation when we go a bit further—the next sentence is:

> "These 'general considerations' (I repeat they are to be found on page 136 of the Court's Opinion) these 'general considerations' involved the most basic concepts of the authors of the Covenant and the authors of the United Nations Charter."

Mr. President, if that is so, if the legal nature and the legal consequences are to be related to the basic concepts of the authors of the Covenant and, later, to the authors of the United Nations Charter, then we are dealing with one and the same thing, namely intention of the original contracting parties. And then I don't understand this submission that the Court's finding did not rest on a premise of tacit consent, of tacit agreement. The Court made it clear that there was

nothing express to support its finding, and the Court did, as I pointed out, refer repeatedly to the contemplations, the presuppositions and the intentions of the authors of the Covenant and of the Charter, and of the founders of the Mandate system; so that quite obviously what the Court had in mind must have been the tacit intent of the contracting parties; so that, although there is at the beginning of this submission a negation of that premise, the submission seems to develop itself into an acceptance of that premise, that the Court founded its conclusion upon a ground of tacit agreement, tacit understanding.

There may, of course, be a difference in this respect, one to which I adverted in my argument in chief, as to when that tacit consent or agreement could be said to have manifested itself in the contemplation of the Court. My interpretation of the Opinion, which I gave to the Court in detail in that respect, is to the effect that that tacit agreement or understanding was found by the Court to exist at the time of transition, 1945 and 1946, because the general considerations related not only to what the authors of the Covenant and of the Mandate system contemplated, but also to what the authors of the Charter contemplated, which brings us into the period 1945-1946. They relate also, if the Court will remember, to the consideration that at the time when the League fell away—the original supervisory organ—then there was another supervisory organ which, in the Court's finding, was competent to take its place. That again relates to a consideration that could have applied only at the time of transition, in the years 1945-1946. Again, when we come to the supporting considerations, the first reference of the Court was to Article 80, paragraph 1, if the Court will remember, and that again brings us to that period, 1945, because the Court was dealing with an underlying presupposition on the part of the authors of the Charter relative to that Article. Finally, the other supporting consideration related to the presupposition of the Members of the League when they adopted the last resolution concerning Mandates, again bringing us into that period. And therefore, my submission is that all this evidence, the new facts on which we rely, all of them bearing very directly on what the intentions must have been during that period—they are of the utmost relevance in overriding the general considerations, the general probabilities, upon which the Court relied in 1950 in the absence of this specific evidence to the contrary which was not then available.

I submit, therefore, that despite the Applicants' submission to the contrary in the passages to which I have referred, the interpretation remains correct, that the Opinion of the Court rested on tacit agreement or understanding, and that this evidence is therefore of the utmost relevance in that regard. And I repeat, Mr. President, just to avoid misunderstanding, that that would be so even if, contrary to my submission, one should consider the basic question to be what tacit intent there was in 1920, with the founding of the Mandate system and the creation of the Mandate; because, there again, even though all this evidence relates to the transition period and to what happened shortly thereafter, if there had been a clear-cut understanding as from 1920 relative particularly to what would happen in the case of dissolution of the League, then somebody at least must have remembered it and must have raised it at the time of transition, particularly in reaction, for instance, to an incident such as occurred on 12 April 1946 when the representative of China said that there was no automatic transfer of functions regarding

Mandates from the League to the United Nations. One would on such an occasion, for instance, have expected a reaction. One would have expected a reaction when Mandatory Powers indicated that there was no intent on their part to have any reporting or accounting in an interim period. And there are the other similar occasions to which I have referred on which one would have expected that reaction. So all this evidence remains of the essence and very relevant on that crucial point.

Mr. President, a further and final submission of the Applicants regarding the so-called "new facts", was that the Court ought in that regard to apply, *if not the letter, then at least the ratio or the minimum standards*, as it was called, of Article 61 (1) of the Court's Statute. My learned friend sought to fortify his argument in that regard by saying that I had admitted that what was stated in that article conformed to "the generally accepted principles favouring the stability of judgments". We find this point developed in the Verbatim at pages 300-301, *supra*. Mr. President, in my submission there is no substance in it whatsoever. I had put it to the Court—there was no question of "*admitting" it*—that the type of requirements stated in Article 61 (1) agreed with the type of requirements generally applied in various legal systems where a principle of *res judicata* applies. But where that principle does not apply, there is no basis, no ratio whatsoever, for putting any requirements of that kind. That was the proposition which I made then, and that is the proposition which I still make. If we are to put it in terms of the Statute of the Court, may I refer the Court to two articles which are both very well known. Article 38 sets out the sources of law to be applied by the Court in deciding international disputes. The last one of these reads (paragraph *d*):

> "Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

And if we read that with Article 59, we find that that Article states:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Clearly then, this is where a previous Advisory Opinion would fall in terms of the Statute of the Court. It would be one of the subsidiary means for determination of rules of law. There is no question here of a principle of *res judicata* applying, which *prima facie* makes the opinion final so that it cannot be reopened except on special grounds. Nobody need show any special grounds for raising an argument in conflict with a previous Advisory Opinion. To put the matter in the proper perspective: It was for the Applicants to come and satisfy this Court that the Court has jurisdiction. Naturally, in their legal argument in that respect, if there is a previous Advisory Opinion which favours the contentions advanced by the Applicants, the Applicants could rely on it, and naturally, if that previous Advisory Opinion is in conflict with, or at variance with submissions that I advance, then I have to deal with it. But there is no obligation to *reopen* a matter in that regard. The Advisory Opinion is an authority, like any other authority, and the only question that arises is a matter of its weight. And if I could adduce to the Court special reasons why the weight that would normally be given *prima facie*

to an Advisory Opinion does not apply in the particular case, then I give the reasons. I give them without reference to requirements of Article 61, or any similar principle of law applicable in circumstances completely different from those which now pertain. And it is only on this question of the weight to be given, as a matter of authority, to the previous Advisory Opinion that the question of the new facts assumes such great importance. And not only the new facts, but as I have stressed, also the new arguments, the new material now placed before the Court and not available in 1950.

That brings me to the end of a consideration of the Applicants' arguments concerning the so-called "new facts". My submission is that they failed completely to break down any of the force of the arguments which we advanced to the Court in that regard. If I may summarize it in a few words, the significance of those new facts lies in the feature that it has provided direct evidence, practical, specific evidence bearing on intent, which specific evidence overrides the general considerations of probability on which the Court relied in 1950 in the then absence of evidence to the contrary.

I proceed, then, to deal with the Applicants' arguments regarding the analysis of the 1950 Opinion, and, Mr. President, there is really little for me to say about that. The Applicants' learned Agent spent a long time on this analysis. We find it stretching in the Verbatim over the pages 301-304, *supra*, and later on, under the heading of *de novo* argument, we actually find more analysis of the 1950 Opinion. And over all that analysis, the one feature that stands out is this, that nowhere do the Applicants attempt to advance any argument in support of that Opinion. Their arguments, as they themselves say, rest on the Opinion and proceed from it. Now, in so far as they seek to interpret the Opinion, there are just three points to which I would like to draw brief attention. The first one is this, that at page 306, *supra*, of the Verbatim, there is stated the submission that the analysis has shown that international supervision of Mandatory administration was an "essential feature" of the Mandate institution. The submission reads:

> "Hence the Court, on the basis of its analysis of the legal nature of this new international institution, concluded that international supervision was an essential feature of the institution and that this had been the view of the authors of the Covenant and the authors of the Charter ..."

This submission is repeated on the same page, page 306, *supra*. The Court will recall I dealt with this very fully in my argument in chief, and this is now the counter-argument on that point. If we look back and see what the submission rests on, we find one element at that page. There is a reference to the five sentences of the general considerations, the first one being—I quote from that page:

> "First, the obligation to 'accept international supervision and submit reports is an important part of the Mandates System'."

That is what the Court said. Now the Applicants argument proceeds:

> "As a matter of fact it has been regarded generally, I think the history shows, as an essential part."

Mr. President, if that is interpretation of the Court's Opinion and if that is the basis upon which this conclusion is founded, then I need say no more about it.

We find one other suggestion which might bear upon it, and that is the one at pages 303-304, *supra*. It is one which is repeated at various stages of the argument, I should say about five or six times in all, and that is to the effect that our contention in its ultimate consequences results in what my learned friend has described as a "convenient, partial lapse", which means that although the sacred trust of the Mandate institution is still in force and effect, although the Mandatory's powers are conditioned with reference to his substantive trust obligations, as originally set out in clauses 2 to 5 of the Mandate Agreement, as we assume for purposes of argument, there will be no international supervision of the Mandate of the two classes, as he described it "administrative", in terms of Article 6, and "judicial" in terms of Article 7. And he said on a number of occasions that that was the very result which the Court described as something which could not "be justified". If we look at the Verbatim at page 262, *supra*, that is the first time where this statement is made:

> "Respondent contends that the Mandate survives, if it survives at all, only on a basis which leaves Respondent with all the rights and privileges of possession and of *administration without international* accountability. Respondent does not find it appropriate to respond to the Court's conclusion in the 1950 Advisory Opinion that precisely such a result would not, in the Court's words, 'be justified'."

The reference there is to page 133 of the Advisory Opinion. I am not going to read it all, Mr. President. We find something similar in the Verbatim at pages 303 to 304, *supra*. We find it again on the same date at page 315, where there was the reference to the Cheshire cat, which the Court might recall. And then at page 321, *supra*, we find a repetition of the same point. Now in my submission, there is no tenable basis for interpreting that particular portion of the Court's Opinion to that effect. What the Court was dealing with there was the proposition, the argument, as then advanced on behalf of the Union of South Africa and stated at the previous page 132:

> "It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception... The League was not, as alleged by that Government, a 'Mandator' in the sense in which this term is used in national law of certain States."

The contention was that because the Mandator, one of the essential parties to the contract of Mandate, had fallen away, therefore the whole Mandate had lapsed, and the conclusion was stated at the end that the Union was left with full title and with no obligations, and that is what the Court referred to at page 133, when it said that:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. 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."

What the Court was referring to there was a suggestion of a total lapse of all Mandatory obligations, but nevertheless a retention of the rights under the Mandate. The Court said those two were inseparably connected with one another, as the Court indeed repeated with reference to the obligations set out in Articles 2 to 5 of the Mandate—the essence of the sacred trust, without which the Mandate could not exist at all. But the Court never, in this passage, suggested that the taking away of the two supervisory clauses—if Article 7 is to be regarded as supervisory at all—the taking away of those two particular obligations, would bring about an end to the Mandate, or that the Mandate could not exist in the form of the substantive rights and powers on the one hand, conditioned on the other hand by the substantive trust obligations. There is no tenable basis for suggesting that that is what the Court meant, or that the Court found that anywhere in its Opinion.

Mr. President, before I leave this passage in the Opinion of the Court to which I have just referred, at page 133, I would like to refer to one other aspect of it. My learned friend came repeatedly on to the theme—that the way in which our case is now presented is less "candid" than it was in 1950, and he continually tried to assimilate the argument now submitted to the Court to the 1950 contention on behalf of the Union of South Africa.

Mr. President, of course the questions before the Court are different. We are concerned here with an issue as to jurisdiction only, and I think I have put my position in that regard quite clearly before, and quite candidly. In order however to avoid any possible misunderstanding on the subject I will put it again, and I will now put it in this form. In regard to our first proposition—the first of the three contentions falling under the heading of the First and Second Objections, namely, that the Mandate is no longer in force as a treaty or convention—the Mandate as a whole we advance that contention in regard to the Mandate seen as an international agreement, and we say it can no longer exist as an international agreement. If that should have the effect that there is no longer a Mandate at all, it does not affect my contention; it still means that the Court has no jurisdiction. But I need not go so far for the purposes of an argument concerning jurisdiction. I need not contend that. There is the alternative, which seems to me is to be found in the Opinion of the Court of 1950, that is, that even in the event of a total lapse of the Mandate seen as a treaty or convention, it could still have an objective existence independently of treaty or of convention. And I say I am perfectly prepared to accept that proposition for purposes of argument, because it does not affect my contention relative to jurisdiction. I need not, at this stage, ask the Court to choose between those two alternatives, because both have the same result as far as jurisdiction is concerned.

Alternatively, I have my second and third contentions which rest upon virtually the same argument, that is, that, whatever might be the position of the rest of the Mandate Agreement, Articles 6 and 7 are no longer in force, or, at any rate, there are no States which can invoke Article 7. When I contend that the question can again arise: are Articles 6 and 7 severable from the rest of the Mandate, or are they not? If they are no longer in force, does that mean that the whole of the Mandate must be taken to have lapsed? If that should be so, Mr. President, if we accept the basis of inseverability, then it does not hurt my argument,

then there is still no question of jurisdiction. It may then be, as the Court suggested, that the Republic of South Africa could no longer rely on a Mandate as being a source of title, of authority, in respect of the Territory of South West Africa. That could be a consequence of that situation, and that implication would then have to be gone into. But it does not arise here, in an issue concerning jurisdiction only. *Per contra*, if, as I have suggested was the basis on which the 1950 Opinions were decided, if the elements contained in Articles 6 and 7 are *severable from the rest of the Mandate institution*, then acceptance of my propositions concerning Articles 6 and 7 does not result in a conclusion that the whole of the Mandate has lapsed. It means that the rest still survives as a trust without, however, international accountability or international supervision, and without compulsory jurisdiction on the part of the Court. Neither of those two alternatives hurts my contention as far as it concerns an issue of jurisdiction. And therefore I think I have made it clear that I am prepared to premise my argument on an assumption that either of those two could be correct.

It remains only for me, Mr. President, to refer to the Applicants' contentions concerning what they called our *de novo* argument. I have pointed out to the Court that initially the suggestion was that our argument as to the merits of these Objections would be dealt with and met, as to their merits, in this section of the Applicants' argument, and eventually it came to nothing in that respect. This section of the Applicants' argument is therefore more significant for what it did not contain than for what it does contain.

So, Mr. President, in regard to the first of the three contentions which I have just mentioned, namely, that the whole of the Mandate has lapsed in so far as it was a "treaty or convention in force", we still have no answer from the Applicants as to who could be parties today to such a treaty or convention, if it is still in force as is contended by the Applicants. There was no attempt whatsoever to answer that question, although its significance—its crucial significance—was stressed and fully dealt with and analyzed in our oral statement. So that still remains unanswered. The Applicants are satisfied to leave it on the basis that the Court found that Article 7 is still in force and must have meant that it was in force as a treaty or convention, and that for the Applicants is sufficient. They do not attempt to justify that finding with reference to the question now pertinently raised as to whether there can be said to be a treaty or convention in force within the meaning of Article 37 of the Statute of the Court.

In regard to our second and third contentions, both of them are based on the fact that there is now no longer a League of Nations, or a Member of the League of Nations that could invoke Article 7. There the Applicants have failed entirely to deal with the interpretation which we, as the result of an exhaustive analysis, say must be put upon the expression "another Member of the League of Nations". They failed to deal with it. And whereas in their written Observations they suggest that our arguments can be met on the two alternative bases of either "succession" or "carry-over", and whereas, if I understand them correctly they try to argue in support of those two propositions in the written Observations—after exhaustive analysis in our oral statement of what

they said in that regard, they come back with nothing further in support of either of those theories.

When it comes to succession, Mr. President, we see in the Verbatim, at page 319, *supra*, that this is what it comes to eventually. I read from that page:

> "Counsel [referring to me] appears to base this attribution to us, on the ground that the Applicants, as he says, 'rely on' United Nations succession—I quote from the Verbatim at page 35, *supra*.
>
> But, Mr. President, it is not the Applicants who 'rely on' United Nations succession. The Court itself decided that issue in the Advisory Opinion of 1950. We draw the necessary inference from the Court's Opinion. We do not bear the burden of sustaining the validity of the Opinion of the International Court of Justice."

That is what the succession argument has now been reduced to, Mr. President. No attempt whatsoever to argue anything on merit in support of that succession theory, the basis being the Court's Opinion of 1950, as apparently some kind of "grundnorm" about which there is to be no question or argument.

Finally, the alternative of a "carry-over", that we also find dealt with in one paragraph at page 319, *supra*, of the Verbatim. And what is stated there? I think I had better read this, Mr. President, because it is significant:

> "The Respondent has also engendered some confusion, we think, with regard to a comment in our Observations at page 446 **(I)**, and I quote, we say there:
>
> > 'There is at the very least a *de facto* carry-over of the League's responsibilities to the extent that an important function of the League continues beyond the League's formal existence.'
>
> As I have demonstrated, it follows inescapably from the 1950 Advisory Opinion that Applicants have a *locus standi*, as United Nations Members, in the cases at bar. In the event, however, that the Court should, for reasons which are not apparent—respectfully—to the Applicants, if the Court should reverse its holding that Article 6 is still in force, then we would contend, as we do here, that Applicants must have a *locus standi* as former Members of the League of Nations, because if they do not, the unanimous holding of the Court that Article 7 is in force is reduced to a nullity. It is a perfectly logical proposition, and it is precisely in this sense that we have referred to the point. If the language is elliptical I express our regret and welcome this opportunity to clear up what seems to be an inescapably logical deduction."

Mr. President, of the *de facto* carry over as a "principle", of that argument advanced in the Observations, and which I think, with submission, we dealt with adequately in our oral presentation, of that there is nothing left. Nothing as a justification for coming to the conclusion that, in the absence of the succession contended for, there could still be competence to invoke jurisdiction on the part of ex-Members of the League. No legal argument advanced in order to arrive at that conclusion, the only suggestion

being that, starting from the basis that the Court found that Article 7 is still in force, and from the further basis that there must be a State or States that can invoke Article 7 in order to keep it in force, therefore it follows that if there should be no succession regarding Article 6, then the only possible States that could have been contemplated, that could bring Article 7 in force, would be ex-Members of the League. That seems to be the type of reasoning in this so-called "perfectly logical proposition". The "logical proposition" leaves out of account, Mr. President, that the Applicants themselves advance that the basis upon which the majority of the Court in 1950 found that Article 7 was still in force, was "succession"; if that basis is taken away, what logic is there in attributing to the majority opinion of 1950 a contemplation of keeping Article 7 alive on the basis of a "carry-over", so that ex-League Members could still invoke it. I fail to see the logic of that proposition.

The Applicants do not attempt to justify the alternative of the "descriptive meaning" interpretation found in the minority opinion of Judge McNair in 1950.

Therefore, Mr. President, we find again that there is absolutely no attempt at justification as a matter of legal argument, as a matter of merit, as distinct from reliance upon the 1950 Opinion for the conclusion that Article 7 is still in force. And in both respects in which opposition was initially offered to our contentions, both the succession, and the carry-over, we find this ignominious retreat.

I could, Mr. President, hardly ask for stronger support for our contentions than this—this obvious inability on the part of the Applicants to advance any argument on the merits in regard to these propositions; an inability which must in all the circumstances be taken to be a self-confessed one, because they could not have demonstrated that more clearly than they have done in the way in which their argument has been presented to the Court. In my submission the Applicants have confirmed that in the light of the facts and the arguments that are now before the Court, the Opinion of 1950 cannot stand in the three respects: regarding Article 6, regarding Article 7, and also regarding the general proposition that there is no longer a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court.

Mr. President, that concludes my replication to the oral statements of the Applicants. My learned friend, Mr. Muller, has asked me to indicate that he finds nothing in the oral statements to which he considers it necessary to replicate regarding the Third and the Fourth Objections. With the leave of my learned Agent, I want to indicate further that as regards the questions that have been put to us by Members of the Bench, we tried our very best to have our answers ready today, but it involved a certain measure of research outside of the precincts of this Court and even outside this town, and we have not entirely completed that. We should be able—we are trying our very best—to have those answers ready on Monday, and we should like to present them then. I would, therefore, with respect, Mr. President, suggest that for that purpose, and for that purpose alone, we do not conclude our replication now. The replication is completed as far as being a reply to the oral statements of the Applicants, but I would like to keep it open for the purpose of dealing with those questions and anything that might flow therefrom.

I thank the Court.

Le PRÉSIDENT: Je retiens donc de ce qui a été dit que vous serez prêt à donner votre réponse aux questions posées par les Membres de la Cour lundi prochain.

Mr. DE VILLIERS: That is our endeavour, Mr. President. We hope to do so to the best of our ability on Monday.

Le PRÉSIDENT: Alors j'espère que ce sera possible. Il est donc décidé que la prochaine audience aura lieu lundi à 10 heures 30.

Et maintenant je m'adresse à M. l'agent de l'Éthiopie et du Libéria. J'ai été informé que votre duplique orale ne serait pas longue; mais, vu l'heure avancée, vous ne pourrez pas la terminer aujourd'hui. Alors je vous pose la question: désirez-vous commencer ce soir pour terminer lundi ou bien peut-être trouverez-vous plus convenable de commencer et terminer lundi?

Mr. GROSS: Mr. President, I wish to comply with the convenience of the Court. I would be prepared to commence now, but in view of the President's gracious suggestion that it might be more convenient to begin on Monday and conclude on Monday, I should prefer that of course.

Le PRÉSIDENT: Alors, il est ainsi décidé. Vous aurez la possibilité de commencer votre duplique lundi. Encore un point: la réponse aux questions qui ont été posées par MM. les Membres de la Cour, pourrez-vous la donner aussi lundi?

Mr. GROSS: Mr. President, I understood that the distinguished Counsel for the Respondent said that he would make the best endeavour to present the reply to the questions asked by the Honourable Members of the Court, that he would try to do so on Monday. We shall, I think, be in a position to answer the question addressed directly to us, and I would then, I believe, say with conviction that we shall be able to, but I am not certain as to exactly when on Monday we will be able to do that.

Le PRÉSIDENT: Il en est ainsi décidé. Les réponses suivront lundi, après la réponse de M. l'agent de la République sud-africaine et après votre duplique orale.

Mr. GROSS: That is understood, Mr. President.

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8. REJOINDER OF Mr. ERNEST A. GROSS

(AGENT OF THE GOVERNMENTS OF ETHIOPIA AND LIBERIA)
AT THE PUBLIC HEARING OF 22 OCTOBER 1962

[Public hearing of 22 October 1962, morning]

Le PRÉSIDENT: L'audience est ouverte. Je voudrais informer les Parties de la procédure qui a été approuvée par la Cour:

La parole sera donnée d'abord à l'agent de l'Éthiopie et du Libéria pour sa duplique orale; la parole sera donnée ensuite à l'agent de l'Afrique du Sud, puis à l'agent de l'Éthiopie et du Libéria, pour répondre aux questions qui ont été posées par les juges; enfin, et dans le même ordre, les agents seront invités à faire savoir si les questions des juges et les réponses qui y ont été faites les amènent à amender leurs conclusions respectives, et, éventuellement, à énoncer les conclusions amendées.

La parole est à Monsieur l'agent de l'Éthiopie et du Libéria pour sa duplique orale.

Mr. GROSS: Mr. President and Members of the Court. In order to economize the time of the Court, I shall turn at once to an appraisal of points of substance raised in Respondent's statement of replication.

We are not conscious of any endeavour on our part to create an "atmosphere by reference to matters of a tendentious, political or emotional nature", in the language of Respondent's Counsel.

Surely, recital of the history of the Mandate and the origin and nature of the dispute does not in itself justify attribution to us of so improper a motive.

> "In the task of ascertaining the true intentions of the parties to these instruments, the circumstances surrounding the creation of the Mandates system and the conclusion of the Mandate Agreement, as well as the conduct of the parties concerned, both at the time and thereafter, are [matters] of great importance."

Mr. President, I have just quoted a sentence from the opening statement of the distinguished Agent for the Respondent. Consistently with the importance of this material, Respondent quite appropriately devotes more than 80 pages of its Preliminary Objections to what is entitled "Historical Background".

It is said also to be "regrettable" that we have referred at some length "to reports of various political committees and bodies containing critical comment". I quote from the Verbatim at page 329, *supra*. But, Mr. President, it is regrettably difficult to discover in the sad history of this matter any other kind of comment.

Counsel for Respondent takes a long leap into the merits—without citation of any document before the Court of which I am aware—that, as Counsel says:

> "... where observers have taken the trouble to come and see for themselves they have almost invariably found that the Mandatory's [*government's*] *version of the facts* has proved to be the correct one...".

I quote from the Verbatim at page 330, *supra*.

Documents which *are* before the Court, many of which are cited in our Memorials, show that one of the major elements of the dispute is that committees and agencies of the United Nations have been denied direct access to information and have, accordingly, been forced to rely upon secondary sources, often supplied at great trouble and risk on the part of petitioners. Reference may be made to any report of the U.N. Committee on South West Africa, all of which reports are cited in our Memorials at pages 62-83 **(I)** and are before the Court. The South West Africa Committee perennially records the Mandatory's failure to submit reports, transmit petitions, or otherwise co-operate in the ascertainment of facts and, despite its persistent refusal to co-operate, representatives of South Africa at the United Nations—as Respondent's Counsel has done here—have attacked or criticized the validity of the Committee's findings, often in sarcastic terms. An example is found in our Memorials at page 80 **(I)**.

I turn now, Mr. President, with the leave of the Court, to a consideration of the premises upon which Respondent lays its request for reconsideration and revision of the 1950 Advisory Opinion.

It is now stressed that in addition to what Respondent's Counsel has called "new facts", there are also "new arguments" which, Respondent contends, "have now been fully presented to the Court, and which were not canvassed at all in 1950". I quote from the Verbatim at page 332, *supra*.

Mr. President, the Applicants were well aware that in the Preliminary Objections Respondent had made the point that its learned 1950 Counsel, Dr. Steyn, appears to have regarded the contention that there were no longer any States which could invoke Article 7 of the Mandate—the compromissory clause—"as a legal proposition which did not require further argument", in Respondent's words in the Preliminary Objections at page 368 **(I)**.

We were aware also of Respondent's assertion that, in the absence of a full argument in 1950 supporting its contention that a literal significance should be given to the phrase "another Member of the League of Nations", in Article 7, this point, as Respondent contends, "may not have been present in the mind of the Court". That comment comes from the Preliminary Objections, at page 373 **(I)**.

Among the many speculative possibilities which might explain why Dr. Steyn did not regard it pertinent to make an elaborate argument in support of a literal interpretation of the phrase "another Member of the League of Nations", may well be that the thought that such an argument was untenable. Dr. Steyn may also have anticipated the admission made by Counsel during the course of his oral statement of 2 October, and I refer to Counsel's comments, the logic of which is impeccable:

> "So [said Counsel] our second contention is that even if the Mandate could, in other respects, be said to be still in force as a treaty or convention within the meaning of Article 37 of the Statute, Article 7 of the Mandate itself ceased to be so in force."

And Counsel continued:

> "Thirdly, Mr. President, on *basically the same argument as applies to our second contention*, namely that another Member of the League of Nations is necessary for [the] operation of Article 7, *there follows*

our third contention which is merely an alternative way of putting the same argument and that is..."

And then he describes what it is. That is the Verbatim at page 32, *supra*. Respondent concedes that its argument regarding the phrase "another Member of the League of Nations" is merely an "alternative way of putting the argument", that Article 7 itself had ceased to be in force. Those are Respondent's own words. Now Dr. Steyn in 1950 may have thought of this "alternative way of putting the same argument". With all respect to Dr. Steyn's undoubted ability, however, it is unlikely that even with some days at his disposal, he could have elaborated the point more skilfully than has been done by Respondent's Counsel at this proceeding.

The point is, Mr. President, that the fact that Respondent's Counsel in 1950 did not elaborate an argument which, we have submitted, is inherently untenable, does not justify an inference that the reasoning underlying the point was not in the mind of the Court when it came to write its Opinion.

It seems to us, respectfully, that Respondent's first "new argument", so to speak, has hardly more survival value than did Respondent's first "new fact".

The second so-called "new argument" appears to be the doctrine of what I have called "partial and convenient lapse", according to which all of Respondent's rights and privileges remain, but none of its obligations of international reporting, accounting or judicial supervision, in terms of the compromissory clause.

We have sought to demonstrate that Respondent erroneously attributes this doctrine of partial lapse to the Court and that, in any event, the consequence of the theory, or doctrine, of partial lapse, is legally, logically, and morally untenable. And that this is precisely what the Court must have meant when, in its Opinion, it referred to such a result as one which "could not be justified", in the Court's words.

Finally, with respect to the "new argument" contention, the Court's attention is respectfully drawn to the discussion in our oral statement in which we sought to summarize the 1950 arguments and then to compare them with what I described as the 1962 model. That attempt of summarization and comparison starts with the Verbatim at pages 311-312, *supra*.

It is submitted then that no arguments have now been put forward by Respondent which are either new in substance or valid in reasoning and which support Respondent's request that the Court reconsider and revise the 1950 Advisory Opinion.

Several brief comments now seem to be in order with regard to the so-called "new facts", as distinguished from the "new arguments", in the light of Respondent's statement in replication.

My first comment with regard to the "new facts" contention concerns what may be described as Respondent's effort to rehabilitate the second "new fact" relating to the proceedings of the United Nations Preparatory Commission in London in 1946. The Court will, if it please, recall that Respondent in its Preliminary Objections refers to a fact which, among others there enumerated, is so "crucially important"—in Respondent's language—that if it had been placed before the Court in 1950 "the Court could not possibly have arrived at its decisive conclusions". I

quote from the Preliminary Objections at page 345 **(I)**. This "new fact"—number ii at page 345—is described by Respondent as follows, and I quote:

> "The rejection by the Preparatory Commission of its Executive Committee's proposal for a Temporary Trusteeship Committee, without substitution of anything regarding possible transfer to, or assumption by, the United Nations of any 'functions under the Mandates System'..."

That is the essence of the description of the second "new fact" at page 345 **(I)** of the Preliminary Objections.

Mr. President, in our oral statement we cited to the Court the statement made in the 1950 proceedings by the late Dr. Ivan S. Kerno, representative of the Secretary-General of the United Nations, and this statement is quoted in our Verbatim at page 300, *supra*.

In adverting to Dr. Kerno's statement, we pointed out that Dr. Kerno had not only explicitly referred to the Commission's rejection of its Executive Committee's proposal, but that Dr. Kerno had also explained to the Court the reasons underlying the Commission's action and *what the Commission had done instead*.

In his replication, learned Counsel for Respondent argues that our showing that this second fact thus had been before the Court in 1950 was, as he said, "completely illusory" (page 335, *supra*, of the Verbatim). And why was it "illusory"? Because, he says, the *real* significance of this second fact is not that the Preparatory Commission had rejected the Executive Committee's recommendation. Rather, what is "crucially important", Respondent submits, is that in 1950 the Court was not told that the Commission had not substituted anything regarding assumption by the United Nations of functions under the Mandates system.

This, Respondent's Counsel describes as the "brunt of the point", and he says:

> "The only information the Court was given regarding the proposal for a Temporary Trusteeship Council and the rejection thereof was the bald statement in the late Mr. Kerno's argument."

I am citing the Verbatim, at page 337, *supra*.

If the Court will be pleased to read the exerpt from Dr. Kerno's statement quoted in our oral argument in the Verbatim at page 290, *supra*, I think it will be apparent to the Court that Dr. Kerno's statement was neither bald, nor limited to the fact mentioned by Respondent's Counsel.

Dr. Kerno's statement set forth precisely what action the Commission took instead, and why.

Respondent's point seems to be that if the Court had been told what the Commission did *not* do—instead of what it *did* do—the Court could not have reached the same decisive conclusions.

Mr. President, at the risk of being facetious, if anyone in 1950 had undertaken to tell the Court everything the Preparatory Commission did *not* do, this honourable Court would *still* be hearing the 1950 arguments, instead of merely hearing them *again*.

Mr. President and Members of the Court, before leaving the second "new fact", brief attention should be given to a matter which sheds further light on the stress Respondent now lays upon the point that

the Court was not explicitly told what the Preparatory Commission did *not* do with respect to the question of United Nations assumption of a supervisory function over Mandates.

As I have pointed out, Dr. Kerno referred to the reasons why the Commission had rejected the recommendation of its Executive Committee for the establishment of a Temporary Trusteeship Committee. Dr. Kerno referred, and I quote from his argument to the Court, Dr. Kerno referred to:

> "... objections of a constitutional nature expressed by some of its members and of the fear expressed that the creation of a temporary organ might have the effect of delaying rather than of expediting the constitution of the Trusteeship Council".

That is the end of the quote from Dr. Kerno's statement to the Court. The statement, as I say, is set forth in text in the Verbatim at page 290, *supra*, for the Court's convenience.

One of these members referred to by Dr. Kerno was the Soviet Union. The Summary Record of Meetings of Committee 4 of the Preparatory Commission sets forth the views of the Soviet Government, expressed by its delegate, Mr. Gromyko, as follows:

> "Considering that there were at present no territories under the trusteeship system, there would be no work for such a temporary body. In view of the solemn pledge concerning trusteeship in the Charter, the members of the United Nations administering mandates could inform the General Assembly that they were willing to place them under trusteeship. They could also present drafts of agreements. The General Assembly, if there was delay, could take certain practical steps for speeding up these undertakings, even at the first session.
>
> The temporary trusteeship committee would in fact delay these provisions of the Charter rather than speed them up. His Government considered it would not be admissible to establish any artificial organ as other more practical and more speedy means existed."

That is the end of the quote of the statement by the Soviet delegate at the Preparatory Commission.

The significance of the action taken by the Preparatory Commission is thus seen in its true light, as explained by Dr. Kerno. It reflected the wish to speed up the process of conversion to trusteeship rather than to terminate Mandatories' responsibilities.

Respondent's interpretation of the Commission's action—implied this is—imputes to the Commission in London an attempt to stultify, if not nullify, Article 80 of the United Nations Charter. In fact, as is clear, the Preparatory Commission's purpose was to expedite the conversion of mandates to trusteeships, not to relieve Mandatory Powers of international accountability, which is the precisely contrary result. It is true, of course, that the Court, in its Advisory Opinion, did hold, with six Judges dissenting, that Article 80 did not impose an obligation to convert mandates to trusteeships, but that is not the point at issue here. What I refer to is a reasonable interpretation of the intention of the Preparatory Commission in London in taking the action it did.

With regard to the third "new fact", relating to the Chinese draft proposal, as we said in the Verbatim, at page 290, *supra*, the alleged

crucial importance of this third fact "hinges upon a carelessly worded, undocumented, unsupported and probably inaccurate" statement in the Preliminary Objections as to why the Chinese Delegate in fact decided not to consummate his wish to propose a draft resolution. I do not think it necessary to dwell on this point further in my rejoinder.

Nor is it necessary, I think, to comment at length concerning Counsel's reference to the fact, as it is, that Respondent's argument that the significance of what took place at the last session of the General Assembly should not be read in the light of—and I quote Counsel's words: "of an outside observer who knows nothing of what took place; South Africa [as he truly said] was represented at the last Assembly of the League, and our representatives know what took place...". That is at page 339, *supra*, of the Verbatim.

Mr. President, I think it is enough to say, on behalf of the Applicants, that so were we and so do we.

Nor need much be said about the fourth "new fact" which, by a process of fission, has now generated a fifth fact as well.

The original No. 4 sought to combine, under the heading "Practice of States", the views of eleven Members of the United Nations Special Committee on Palestine, as reflected in the Committee's report of September 3rd, 1947, combining these views, as I say, with the views expressed by three other States in 1946, 1947 and 1948 respectively. This is in the Preliminary Objections at pages 336-337 **(I)**. Respondent cites these views of States to support a contention, and I quote Respondent, that the "practice of States showed a general understanding that the League supervisory powers in respect of Mandates had not been transferred to, or assumed by the United Nations". That is at page 334 **(I)** of the Preliminary Objections. One of the States referred to is the Soviet Union; another the United States.

Respondent's interpretation of the Soviet position rests upon a statement made by Mr. Gromyko in the Security Council on 2 April 1947, during a debate on the draft trusteeship agreement for the former Japanese Mandated Islands.

Respondent quotes excerpts from Mr. Gromyko's statement, at page 337 **(I)** of the Preliminary Objections. A fair reading of these excerpts, I submit, shows clearly that Mr. Gromyko said—and quite correctly, we submit—that "there is no continuity, either legal or otherwise, between the Mandatory system of the League of Nations and the Trusteeship system laid down in the United Nations Charter". And Mr. Gromyko added, again, we think, quite correctly, that the "Security Council is not competent to decide to what extent Japan may have violated the conditions of the Mandate system and the duties involved in the administration of Mandated territories". These are excerpts quoted in the Preliminary Objections, at page 337 **(I)**.

Mr. President, the point at issue in the Security Council debates was whether Japan's title to the Mandated Islands should be declared forfeit by reason of asserted violations by Japan of the terms of the Mandate. The Soviet delegate maintained that such a declaration by the Security Council was not necessary; that title to the islands would be determined in accordance with the Trusteeship system, which, of course, was designed to supersede the Mandates system. This was wholly consistent with the Soviet position respecting the relationship between the two systems, as

reflected in the Soviet delegate's comments at the Preparatory Commission in the preceding year, to which I have already referred.

I think that this clarifies the Soviet position, if indeed clarification is needed, and it would seem quite untenable to argue, as does Respondent, that the Soviet Union took the position that Mandatories' responsibilities terminated with the dissolution of the League. On the contrary, the Soviet position was that the Mandatory responsibilities would be superseded by Trusteeship responsibilities.

The United States views were exactly the same in this respect.

In Respondent's statement in replication, Respondent's Counsel reverted to the United States' views regarding the question whether the United Nations, as Counsel put it, "took over the League of Nations Mandate system". This form of expression is, of course, ambiguous. I refer to page 343, *supra*, of the Verbatim. The real issue is whether the United Nations Charter, and in particular Article 80 (1) thereof, contemplated that pending conversion of Mandates into trusteeships which was, as this Court said in 1950, the "normal course" Members of the United Nations expected—the rights of the inhabitants of Mandated territories would be fully protected, again as the Court said in 1950: "under all circumstances and in all respects". That is the language of the Court relating to Article 80 (1).

Respondent's Counsel referred by name to the United States delegate to the Trusteeship Council and repeats an excerpt which Counsel had previously quoted in his oral statement at page 117, *supra*. The United States delegate, Mr. Benjamin Gerig, has long been known as an outstanding authority on trusteeship matters.

The debate in 1947 in the Trusteeship Council concerned information to be furnished by Respondent in connection with the South West Africa Mandate. A fair reading of the record of the debate will show, I believe, that Mr. Gerig was intent upon one major objective: to obtain, as tactfully as possible, assurance by South Africa that it would transmit full information concerning its administration of the Mandate.

Other statements made by Mr. Gerig, and I shall quote one illustratively in a moment, other statements made by Mr. Gerig show that in the course of this debate, and with this objective in mind, he was navigating through some diplomatic shoals. I quote the following excerpt from a statement made by Mr. Gerig during the same debate:

> "*I am among those who always have believed that the mandate does continue in force*, but there are others who do not take that view. Therefore, because of some doubt here, I raise that question. I would add that even if it does remain in force, that thought, namely, whether the Union Government is discharging its duties under the Mandate, looks as if we have certain supervisory functions to see to it that the Union Government discharges its responsibilities under the Mandate."

That is from Mr. Gerig's comment at the 15th Meeting, at page 505 of the document cited—the Minutes of the Session of the Trusteeship Council.

Mr. Gerig's view that the Mandate continued in force so long as necessary to protect the inhabitants of the territories was, of course, entirely consistent with the position of the United States taken at San Francisco two years earlier, and I shall revert to that point after the translation.

Mr. President, I referred in some detail in my oral statement to the leadership taken by the United States in sponsoring and steering through to adoption the so-called "conservatory clause", that is to say, Article 80, paragraph 1, of the Charter.

In the course of his Statement in reply, Respondent's Counsel, at pages 342-344, *supra*, of the Verbatim, undertook an extensive analysis with respect to the origin and meaning of this clause of the Charter and he attributed to the Court the intention to rule that supervision over Mandates was nothing more than what the Court considered to be a general consideration of "probability".

In our own submission, respectfully, the Court's treatment of Article 80, paragraph 1, the contexts in which the Court refers to the Article, and the striking emphasis of the language with which the Court interprets the clause, do not bear out Respondent's interpretation of the Court's meaning. Our own approach to the point is set forth in the Verbatim at pages 304-307, *supra*.

Reverting to the views of the United States at San Francisco regarding Article 80, paragraph 1, Respondent's Counsel quotes an excerpt from the United States delegate. He omits the next following paragraph from the delegate's statement at San Francisco, which I shall read with the Court's permission:

> "It is clear [said the delegate of the United States] that paragraph 5 (that is, Article 80, paragraph 1) is intended to preserve the rights during that in-between period from the time this Charter is adopted and the time that the new agreements are negotiated and completed with the new organization. And it is not intended that paragraph 5 [that is, Article 80] should be any basis for freezing eternally the situation affecting any territory."

It seems clear that, just as in the case of the Soviet Union and most other Members, it was assumed that the normal course would be followed and that all Mandates would either be converted into trusteeships or would, as has happened with the rest of them, be granted independence.

If any doubt could remain concerning the views of the United States Government, they are put to rest by the position taken by the United States during the 1950 proceedings before this honourable Court.

I should like now to turn briefly to the "fifth factor", as it is now called. In his first reference to this factor, Respondent's Counsel qualified his description of the factor and said it was that one might "almost" call a fifth group also under the heading "Practice of States".

It is, accordingly, desirable to give brief attention to this fifth factor, and this can be done in a few sentences.

In the first place, the so-called "Practice of States" covering the years 1947 to 1949 is not, and cannot be asserted to be, new material not before the Court in 1950, even in the sweeping interpretation given by Respondent to the phrase "before the Court".

Respondent contends that there was nothing vague or shifting in the position of 25 States which, over the years 1947, 1948 and 1949, and I quote from Respondent's Verbatim:

> "expressed the understanding that there was, outside of a Trusteeship Agreement, no obligation to submit to supervision ... and no power of supervision on the part of the United Nations in that respect".

This is from the 19 October Verbatim.

Putting aside for the moment the fact that this is not "new material", Respondent's analysis of the views of States, under the heading "Practice of States", is to be compared with the analysis of the United States in its Written statement submitted to the Court in the 1950 Advisory proceedings.

In its statement, at page 103 of the Pleadings, the United States says:

> "The general tenor of discussion in the General Assembly from 1946 to 1948 was that the mandate for South West Africa continued in existence."

The United States statement then goes on, at page 103 of the Pleadings, to cite the views of 11 Members, including two separate statements of the United States' views in these years, to that effect. These are two of the years covered by Respondents in Respondent's analysis of the views of States: 1947 and 1948.

The United States statement then proceeds:

> "A minority of the members of the Assembly took the position that the Mandate had already expired; most of these premised their conclusion by contending that the trusteeship system had already in fact replaced the Mandate system since the placing of Mandates under trusteeship was compulsory."

That of course was the view at the time these States referred to.

Under this heading, the Written statement refers to the Soviet Union position as well as that of five other States.

The United States statement goes on, this time at page 104 of the volume of Pleadings of 1950:

> "South Africa at the sessions of the General Assembly in 1946-1947 by no means embraced the minority view but firmly supported the view of the majority."

Finally, says the 1950 Written statement of the United States:

> "Recent developments with respect to the Union of South Africa's administration of South West Africa and the expressions of Union representatives indicating partial or total termination of the Mandate, although perhaps foreshadowed in 1947, first clearly appear in 1948. Read beside the record of contemporary events and statements, such belated comments are not persuasive as to the intentions and understanding of the Union and other States when the League was dissolved and the United Nations established."

That is at page 104, from the United States Written statement of 1950.

And, Mr. President, it is remarkable to note that among the States cited by the United States statement as holding the view that *the Mandate responsibilities continued in existence*, six States are to be found on Respondent's list of States which, according to Respondent's submission, *at the same time held the view that the United Nations had no supervisory power*. It is in this respect only necessary to compare, or one may say contrast, Respondent's analysis, as it appears in the Verbatim at page 127, *supra*, with the United States analysis of 1950 as it appears at pages 103 to 104 of the Written statement submitted to the Court in 1950.

Comment is not necessary. I call the Court's attention to the two sets of analyses and leave it at that.

In conclusion, it seems that this fifth new factor does not add much fuel to Respondent's case for reopening the 1950 Advisory Opinion.

Applicants contended, in the Verbatim at pages 300-301, *supra*, that the Court should, in the exercise of its sound discretion, refuse to reconsider the Advisory Opinion. We cited Article 61, paragraph 1, as reflecting what Respondent itself asserts to be generally accepted principles favouring the stability of judgments. That is the sense, if not the language, of Respondent's contention. We submitted that the Court should apply the minimal standards embodied in Article 61, paragraph 1.

Respondent in its statement in replication reverts to this matter, insisting that Article 61, and the general principles it embodies, are irrelevant, on the ground that the principle of *res judicata* does not apply to Advisory Opinions.

That the principle of *res judicata* does not apply to Advisory Opinions is correct; but that is beside the point.

As Respondent's Counsel conceded, Advisory Opinions are entitled to what he termed—justly—"strong *prima facie* weight as being of precedential value as an authority". I quote from the Verbatim at page 100, *supra*. In its Preliminary Objections, Respondent likewise conceded that only—and I quote—"where good reasons exist therefor", should Advisory Opinions be departed from in subsequent contentious proceedings—I cite page 214 **(I)** of the Preliminary Objections.

And in his oral statement in reply, Respondent's Counsel put it this way:

> "The Advisory Opinion is an authority, like any other authority, and the only question that arises is a matter of its weight, and if I could adduce to the Court *special reasons* why the weight that would normally be given *prima facie* to an Advisory Opinion does not apply in the particular case, then I give those reasons, I give them without reference to requirements of Article 61, or any similar principle of law applicable in circumstances completely different from those which now pertain."

That is at pages 350-351, *supra*, of the Verbatim.

The difference between the Parties, then, is very simply stated. By what criterion or yardstick are the "special reasons" referred to by Counsel to be evaluated? We submit that the minimal standards, embodied in Article 61, paragraph 1, of the Statute of the Court, and general accepted principles of law, should be looked to to furnish a criterion. Respondent, as we see it, suggests no standard or scale of measurement whatever.

Is Respondent's own evaluation of its "new facts" and "new arguments" to govern?

We believe the question answers itself.

Mr. President, I venture the thought that at this time the Court may perhaps wish a comment concerning the length of the remaining argument in Rejoinder. I shall endeavour to telescope the balance of what I have to say, in deference to the important questions which have been addressed to the parties by learned Judges and shall attempt therefore to conclude my remarks as briefly as possible so as to leave time at this session for the responses to those questions.

Respondent's contentions, with respect to our, as he says, failure to deal with its arguments *de novo*, we feel reflect a misunderstanding of a large part of the burden of our effort. We did indeed attempt to deal with the merits of the arguments *de novo*, even though we thought it was not necessary to do so, in view of our submission that there is no basis for reconsideration of the Court's Advisory Opinion. We did, for example, attempt to meet head-on the contention with respect to partial lapse; we did attempt to meet head-on the contention with respect to its interpretation of the clause in Article 7 relating to another Member of the League of Nations; we did also attempt to evaluate the Court's decision as to Article 80, paragraph 1, and its interpretation in the light of its history, which we have cited, and in the light of its apparent reasons as are to be inferred from its history. Moreover, we have attempted to meet head-on Respondent's argument with regard to partial lapse, by referring to universally accepted principles of fiduciary obligations which we think demonstrate the inescapable validity of the Court's comment that the result contended for by Respondent could not be justified. So far as Respondent's interpretation of the Court's meaning with respect to the point of "justification", we believe that our contentions reflect a correct interpretation of the Opinion and respectfully leave it at that. Respondent has attempted to reinterpret the Court's Opinion with regard to the legal nature of the Mandate institution. Respondent does this by interpreting the sentence on page 136 of the Court's Opinion relating to, what the Court called, an *important* aspect of the international obligations assumed by the Mandatory. In the general considerations appearing in that same paragraph, at page 136 of the Court's Opinion, will be found several sentences which justify, we think, *our* interpretation that the Court was indeed referring to these international obligations as *essential* rather than merely *important* and that can be found, I think, from an inspection of the text itself, particularly of the third and fourth sentences, at page 136 of the Opinion, in that paragraph.

Finally, if it please the Court, Counsel for Respondent have seen fit to intimate that complex and highly charged issues underlying this dispute should dissuade the Court from taking up the merits, that at any rate is how the proposition sounded to us. The Court itself has supplied a short answer to any such proposal, if that indeed is the intent of Respondent's point. In its Advisory Opinion of July 20, 1962, relating to *Certain expenses of the United Nations*, the Court said (page 155 of the volume of Judgments 1962):

> "It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision."

Mr. President and Members of the Court, may I conclude in thanking the Court for its attention, with a statement with which I opened my comments:

> "It is possible to achieve the Rule of Law only because this Court sits."

Thank you.

9. ANSWERS TO QUESTIONS PUT BY MEMBERS OF THE COURT

Le PRÉSIDENT: Maintenant je donne la parole à Monsieur l'agent de la République sud-africaine seulement pour répondre à des questions qui ont été posées par des membres de la Cour.

DR. VERLOREN VAN THEMAAT: Monsieur le Président, la réponse à la question posée par M. le Président Basdevant est la suivante: l'expression « n'ont pas de *locus standi* » employée dans le contexte indiqué par M. le Président Basdevant signifie une absence de compétence des demandeurs à introduire ou soutenir la présente affaire conformément à ou en vertu de l'article 7 du Mandat. L'expression *locus standi* est une abréviation de l'expression *locus standi in judicio*, c'est-à-dire littéralement une place pour se présenter à la barre. Dans la pratique judiciaire générale, l'expression signifie la compétence de recourir à la procédure judiciaire.

Monsieur le Président, si la Cour le veut bien, M. de Villiers répondra maintenant aux questions posées par sir Percy Spender. Quand M. de Villiers aura fini sa réponse, je soumettrai une requête d'amender nos conclusions. Merci Monsieur le Président.

Le PRÉSIDENT: La parole est à Monsieur de Villiers.

Mr. DE VILLIERS: Mr. President, in presenting this reply to the questions put by Sir Percy Spender, I would like to state at the outset that this is the best we can present within the limited time at our disposal. I say that for this purpose, that if the Court, or any Member of the Court, should feel that we could be of further assistance by further investigation, further research, or by amplification of what we state in reply to the questions, then we would naturally be only too pleased to co-operate in that regard, and to put before the Court anything further that may be indicated in a request to us. Whether that should be by further oral representation, or in writing, would be a matter which we could leave to the Court if it should wish to address a further request to us.

The questions as put by Sir Percy Spender required answers "in as summary and as precise a form as possible". For that reason, we have prepared our answers in writing and, contrary to what I have been doing thus far, I shall more or less read the answers to the Court with a mere deviation here and there for purposes of brief comment.

We suggest that the following historical facts furnish a background for answering the questions put by Sir Percy Spender. The first is, that on 7 May 1919, the Council of Three, represented by Monsieur Clemenceau, President Wilson and Mr. Lloyd George, announced that they had "decided on 6th May as to the disposition of the former German colonies as follows:" and then, one of the items following was: "German South West Africa: The Mandate shall be held by the Union of South Africa". The quotation, Mr. President, is from the *League of Nations Official Journal* of June, 1920, at page 206. We refer to that matter also in our Preliminary Objections, at page 220 (**I**), and I can further refer the Court in this regard to Kluyver, *Documents of the League of Nations*,

pages 291 and 292; H. Duncan Hall, *Mandates, Dependencies and Trusteeships*, pages 145 and 146; Quincy Wright, *Mandates under the League of Nations*, page 43; Temperley, *A History of the Peace Conference of Paris*, Volume II, page 241.

It will be noted, Mr. President, that this disposition occurred before the Covenant of the League of Nations came into force, the date of this latter event being 10 January 1920, and even before the Treaty of Versailles was signed, that date being 28 June 1919. Therefore, I might add that, with a view to its significance in regard to the questions put, this was long before the Council of the League came into existence.

The next important fact, or group of historical facts, was the following. A Commission of the Supreme Council of the Principal Allied and Associated Powers, under the chairmanship of Lord Milner, prepared a draft Mandate for South West Africa, together with other draft Mandates, in the summer of the year 1919. We find references to this fact in Quincy Wright, at page 47; in the work of E. M. House and C. Seymour, *What really happened at Paris*, pages 227 and 440; in the work of Temperley, to which I have referred, Volume II, at page 237; in Duncan Hall, at page 136.

We know from these sources that a draft was prepared, but that the transmission of the draft to the Council was delayed because of a difference of opinion regarding the question whether the open-door principle was intended to be applicable in the case of C Mandates. Further reference may be found to this point in Kluyver, at page 292; Temperley, page 239; Quincy Wright, pages 47, 48 and 50.

Still in connection with the drafting of the Mandates, the determination of the terms of the Mandates, we find that the Council of the League, on 5 August 1920, decided to request the Principal Powers to do certain things. We find that in a resolution of the Council of that date. Firstly, the request was to:

> "name the Powers to whom they [the Principal Powers] have decided to allocate the Mandates".

And further, *inter alia*,

> "to communicate to it [the Council] the terms and conditions of the Mandates that they propose should be adopted by the Council from following the prescriptions of Article 22".

In other words, here was an invitation to the Principal Powers by the Council to make proposals, but proposals only in regard to terms which they proposed should be adopted by the Council, the indications being that the definitive action was intended to be that of the Council.

We find further (I will give the references in a moment) that the Council also decided in that same resolution—at any rate on the same day—that it would:

> "take cognizance of the Mandatory Powers appointed and will examine the draft mandates communicated to it, in order to ascertain that they conform to the prescriptions of Article 22 of the Covenant.
>
> The Council will notify to each Power appointed that it is invested with the Mandate, and will, at the same time, communicate to it the terms and conditions."

The reference is to the Hymans Report, which was approved by the Council at its San Sebastian session. We find it in the *League of Nations Official Journal,* No. 4 of 1920, at pages 334 *et seq.* There is a reference also to the same matter in Quincy Wright, at pages 109 to 112; and in Duncan Hall, at page 146.

Next, Mr. President, we find that the minutes of the Council of the 14th December 1920, in other words, about four or five months after the request of August, indicate that on that date Mr. Balfour, the United Kingdom representative,

> "handed in draft mandates proposed by the British Government for"

a certain number of territories, and that list of territories included, *inter alia,* German South West Africa. The reference there is to the *League of Nations Official Journal,* 2nd Year, No. 1, page 11. And we find that the minutes further reveal that the Council referred these drafts to the Secretariat:

> "to consider the Mandates and to consult other legal experts on any points they considered necessary".

Mr. President, the next stage in the developments was that on 17 December 1920, the Council of the League considered a memorandum on the drafts, which had been prepared (the memorandum had been prepared) by its Secretariat, and this memorandum contained certain suggestions for amendments which were subsequently accepted by the Council. The fact that that was so, relative to certain amendments, is referred to in the *League of Nations Official Journal* of the 2nd Year, No. 1, at page 12, and there is also a reference in Duncan Hall, at page 153. But those sources do not reveal exactly what the amendments were. We know what the ultimate result was; we do not know from those sources what the Balfour draft was on the particular points in respect of which there were amendments.

We did not know—and I say *we* as representing the Respondent—did not know that either, until this further research resulting from the questions put by Sir Percy Spender. We have now at last succeeded in gaining access to the document—the Balfour draft—in this regard, and that reveals what these amendments were. But before I refer to them I must ask the leave of the Court to do so because of the fact that the document itself which we can offer in proof has not arrived from Geneva. We have the assurance of the librarian at Geneva that the document is there and it is being forwarded. We know exactly what the textual points of importance are as far as the amendments are concerned, and I am in a position to tell the Court what they are, if the Court would accept them as being subject to proof and subject to our filing of the document when it arrives from Geneva. Could that please be rendered to the Court first?

May I proceed, Mr. President? I thank you.

It appears that the amendments related to the following points. Firstly, the fourth paragraph of the preamble of the declaration as it now exists, Annex B to our Pleadings, that was added by the Council; that is the fourth paragraph of the preamble which reads:

> "*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."

The Council appears, if I may interpose, by the insertion of this portion of the preamble, to have emphasized the need for definitive action on the part of the Council and to have referred specifically to paragraph 8 of Article 22 as explaining the sense in which the Council would act, the sense of defining the degree of authority, control or administration to be exercised by the Mandatory.

Then, a consequential amendment, or what appears to be consequential, was made in the last words of the preamble, or shall we say the words following on the preamble, the last words before the operative portion. There the original words were: "The Council hereby approves the terms of the mandates as follows." For those words there were substituted the present words, namely: "Confirming the said Mandate, defines its terms as follows."

The third alteration concerned Article 7. Perhaps one should say the third and fourth, because it entails alterations both in the first part of Article 7 and in the second part. The original clause, as contained in the Balfour draft, read as follows:

> "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate."

Thus far there is no difference; but then what the draft contained in addition was this:

> "provided that in the case of any modification proposed by the Mandatory, such consent may be given by a majority".

I do not know that any significance attaches to that point for our purposes, but that was the point of difference in that regard.

Then as regards the second portion, the compromissory clause in the Balfour draft read as follows:

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

The Court will immediately see the significance. Where we now have a dispute between the Mandatory and another Member of the League of Nations, the original idea was a dispute between the Members of the League of Nations.

The Court will recall that my learned friend Mr. Muller, in dealing with our third objection, on 10 October referred to a report by Viscount Ishii, commenting on the amendments which had been brought about to the drafts in the Council of the League. At that stage we did not know exactly what the formulation of the original draft was, but one could get an indication of that from this report. We find it in the Verbatim dealt with at page 215, *supra*, and there is this citation from the report by Viscount Ishii. I refer to the last paragraph of it. Perhaps I should refer to the whole citation. It begins by setting out that:

> "The Council will perhaps desire to alter the first paragraph of this article so that it shall read as follows:"

and then the reading follows with the comment:

"A similar alteration has been made by the Council in the draft C mandates. It was inspired by the consideration that Members of the League other than the Mandatory could not be forced against their will to submit their differences to the Permanent Court of International Justice."

I refer to this merely in passing as supporting the point made there by my learned friend, Mr. Muller, in this regard, that that original formulation contains no suggestion whatever of any judicial supervision of the Mandate. It relates to prospective disputes between Members of the League, and the reason for the alteration also indicates no intention whatever of providing for judicial supervision. The reason was simply the one as stated there.

Those then were, as far as we have been able to ascertain, the alterations actually decided upon, the amendments decided upon by the Council of the League after considering the draft as proposed by Lord Balfour on behalf of Great Britain.

Now, Mr. President, in the light of this historical survey, perhaps I should say against its background, we submit that the questions put by Sir Percy Spender may be answered as follows:

I read out for the purposes of convenience the formulation of the question and then the answer.

Question 1. Had the terms or provisions of the Mandate as they appear in that declaration, and the designation of the Respondent as Mandatory, already been agreed to between the Principal Allied and Associated Powers and His Britannic Majesty on behalf of the Respondent, prior to any action taken thereon by the Council of the League, subject however only to the approval by the Council of these terms or provisions to the extent it was required to define the degree of authority, control, or administration to be exercised by the Mandatory under Article 22 (8) of the Covenant, and to satisfy itself that these provisions and terms were not inconsistent with the provisions of Article 22 of the Covenant? If so, in what document or documents is such agreement recorded?

Our answer is, Mr. President, that this question can best be answered in two parts, separating the designation of the Respondent as Mandatory from the determination of the terms of the Mandate, since these two matters were dealt with separately.

First, then, the designation of South Africa as Mandatory for South West Africa was a function of the Principal Allied and Associated Powers. Such designation was decided upon by them on 6 May 1919 and notified to the Respondent on 7 May 1919, for which fact we have already cited the necessary proof.

Then, secondly, the terms of a draft mandate for South West Africa were drawn up and approved by the Principal Powers, subject to a reservation by one of them on the question of omission of an open-door provision. The terms of the draft differed in the respects which I have already indicated from the declaration as now contained in Annexure B to the Preliminary Objections and to the Observations.

Now, on the question whether there was any agreement to, or approval of, the terms of this draft by the Respondent as Mandatory, on that question we, the Respondent's representatives, can, on the information available to us, take the matter no further than to say that agreement

or approval is suggested by certain factors. The first is the statement which we find in the third paragraph of the preamble of the declaration that:

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

Knowing, as we do, that that was a provision which had already occurred in the draft and was not amended by the Council, it appears to show that there must have been prior indication of approval or assent to the terms of the draft by the Mandatory.

The second factor is that the United Kingdom was one of the Principal Allied and Associated Powers and that the Government of the United Kingdom, under the designation "His Britannic Majesty", formally represented the Government of the Union of South Africa in the acceptance of the Mandate, thus rendering probable that there would have been consultation between the United Kingdom and South African Governments as to the terms of the draft.

And, thirdly, almost a corollary to the previous point, is the fact that the draft was "handed in" to the Council by the United Kingdom representative as one of the "draft mandates proposed by the British Government". That was the phraseology used on the introduction of the draft.

Therefore, Mr. President, there is no question here of a formal document, in the sense of a treaty or convention, which can be referred to as indicating an agreement as between the Mandatory and the Principal Powers prior to the matter being referred to the Council of the League. There are these indications that there was probable agreement as between the Mandatory and the Principal Powers as to what these proposed terms should be, as to what the terms of the draft should be. That is as far as the matter goes.

In our submission, all the available evidence as we have dealt with it suggests that in so far as there may have been such agreement, that agreement was not intended to be constitutive of a treaty or convention to come into force between the Principal Powers and the Mandatory. The agreement, which we infer must have been there, concerned merely the terms of a *draft mandate* to be submitted to the Council for its approval, in other words *proposed* terms for definition by the Council. The very submission to the Council implied an acknowledgment of a right or power on the part of the Council to disapprove and/or amend the proposed terms, and we know that that power was in fact exercised as regards amendment.

That submission to the Council also carried an acknowledgment, or shall I say a contemplation, that only appropriate action on the Council's part would legally bring terms of a Mandate into force, that appropriate action being definition in terms of, or in pursuance of, Article 22 (8) of the Covenant.

We find also that the wording and the contents of the proposed terms show that they were not designed or intended for operation as between the Mandatory, on the one hand, and the Principal Powers as such, on the other hand. They do not purport to set out a legal relationship which

was to operate as between the Mandatory and the Principal Powers as such. That is not the way in which they were designed, that is not the way in which they read, that is not their apparent purpose at all.

We find, therefore, that there was apparently in fact no contemplation that such agreement as there may have been between the Mandatory and the Principal Powers prior to reference of the matter to the Council of the League, could itself be regarded as being of the nature of a treaty or convention. Action in accordance with that view of the situation, to which reference may be made, is that of the United States of America, which was one of the Principal Powers that acted at the stage of allocation of the Mandates and at the stage of preparation of draft mandates, but who later, because of the fact that the Treaty of Versailles was not ratified on behalf of the United States, entered into separate agreements and conventions with the various Mandatory Powers in order to secure rights in the Mandated territories such as a Member of the League would otherwise have. That indicates an absence of a contemplation that by the mere agreement with the Mandatory as a Principal Power at the time any such treaty would have come into operation.

We conclude, therefore, in answer to this question that there would be no justification in law, in our submission, for saying that a treaty or convention came into force between the Mandatory and the Principal Powers by reason of the probable agreement between them, prior to any action taken by the Council, upon proposed terms for the Mandate.

[Public hearing of 22 October 1962, afternoon]

Mr. President, I proceed with question 2, which read:

> "Did the Council of the League, in relation to the creation of the Mandate, have under the Covenant or otherwise any power or authority
>
> *(a)* to determine the terms and provisions of any Mandate other than those which defined the degree of authority, control or administration to be exercised by the Mandatory and to ensure that the terms and provisions were not inconsistent with the provisions of Article 22 of the Covenant? or
>
> *(b)* did it have any power or authority to designate a Mandatory or confer a Mandate on any Power?"

and then there is a further general question under 2:

> "And did it ever purport to exercise any such power or authority in relation to the Mandate?"

Our answer is as to *(a)*: Article 22 did not confer on the Council of the League any power to determine the terms and provisions of any Mandate apart from the definition of authority, control or administration as set out in Article 22 (8). Under Article 4, paragraph 4, of the Covenant, however, the Council could deal with:

> "any matter within the sphere of action of the League or affecting the peace of the world".

This gave the Council a general power which it was possibly entitled to use in relation to the creation of Mandates in so far as such action might

be conducive to the achievement of the purposes of Article 22 and was not inconsistent with the terms of that Article or with the rights of the Mandatory. We would not strenuously contest a suggestion to the effect that, on that basis, the Council might be said to have power to make provision for matters ancillary to those expressly mentioned in Article 22.

As to *(b)*, no power or authority to designate a Mandatory or confer a Mandate on any Power was given to the Council of the League.

And then the general question as to what the Council purported to do in this regard, our answer is: the Council of the League never purported to exercise any power or authority such as is referred to in part *(b)* of the question. In regard to a power or authority as referred to in part *(a)* of the question, the Council might possibly be taken to have purported such exercise with reference to the compromissory clause in Article 7 of the Mandate, with the Mandatory's consent and in accordance with the considerations which we have mentioned above at the conclusion of our answer to part *(a)* of the question.

We come then to question 3:

> "Does any party to these proceedings claim that the Declaration by the Council (Annex B) is *in itself* a treaty or convention?"

Our answer is this: in its written Objections and oral statements Respondent proceeded on the assumption that the Mandate for South West Africa, as recorded in the Declaration by the Council (Annex B), was during the lifetime of the League of Nations a treaty or convention in itself, that is, an international agreement between the Mandatory on the one hand, and, on the other, the Council representing the League and/or its Members. We stated several times, Mr. President, that that proposition could be taken to be common cause as related to the period of the lifetime of the League.

The questions now raised, however, necessitate reconsideration of this assumption. And we submit that the alternative view might well be taken that in defining the terms of the Mandate, the Council was taking executive action *in pursuance of* the Covenant (which of course was a convention) and was not entering into an agreement which would itself be a treaty or convention.

This view—we put it no higher than a view that might be taken—would regard the Council's Declaration as setting forth a resolution of the Council, which would, like any other valid resolution of the Council, owe its legal force to the fact of having been duly resolved by the Council in the exercise of powers conferred upon it by the Covenant. This view would further regard the Mandatory's consent not as a constituent element of an international agreement, but as something intended to assure the unanimity required for a Council resolution or, possibly, something intended to prevent possible prejudice on the part of the Mandatory, seen as a League Member whose interests were affected within the meaning of Article 4 of the Covenant, the Article which provided for special representation of a League Member on the Council in the event of consideration of a matter affecting that Member's interests. We point out that the Mandatory's assent, consent, or agreement could then possibly be viewed on the basis of meeting with the requirements underlying those provisions of the Covenant, as being something practically necessary with a view to an effective Council resolution.

We submit further that on the basis of this view the Declaration itself would not be a treaty or convention, just as little as any other Council resolution would be a treaty or convention; nor would it be part of the convention (the Covenant) in pursuance of which it was made, just as little as any other Council resolution would be part of the Covenant.

Such a view might, however, possibly require qualification regarding the compromissory clause in Article 7 of the Mandate, which could not subject the Mandatory to compulsory jurisdiction without the Mandatory's consent thereto. Therefore, even on the basis on which we are proceeding now, the consent of the Mandatory may well have to be viewed in a different light as applied to Article 7 than as applied to the rest of the Council's Declaration. Possibly that provision in Article 7 would for this reason nevertheless have to be regarded as being of the nature of an international agreement.

On the other hand—we are trying to put the two points of view in this regard, Mr. President—support for the view that no portion of the Declaration was intended to be a treaty or convention is afforded by certain considerations. These are, firstly that it was called a "declaration" and not a treaty or convention; secondly that it was not signed by any parties; thirdly that it contained no provision for ratification, and was in fact not ratified by any State—the Declaration itself merely providing that certified copies were to be forwarded to all the signatories of the Treaty of Peace with Germany; and fourthly that the Declaration was not intended to be registered under the provisions of Article 18 of the Covenant—as appears from its own terms, inasmuch as it provides in its conclusion that it was to be deposited in the archives of the League.

Perhaps I could add a fifth consideration, to this effect: that there appears to have been a large measure of uncertainty amongst the commentators, and historically on the part of the organs of the League themselves on the question whether the Council ever had treaty-making capacity at all; and I am told, although I cannot vouch for this statement—I have not made the investigations myself—that there is no case on record where the Council purported to enter into a treaty, unless one regards the present case as being such a case.

Then we come to question number 4, which reads:

> "If this Declaration was not in itself a treaty or convention, what were the constituent elements which comprised the treaty or convention; in particular, what other agreements, if any, or what other acts on the part of any State or States established the treaty or convention in relation to the Mandate on the terms or provisions set out in the Declaration?"

Our answer is, Mr. President, that if Annex B was not in itself a treaty or convention, in the sense as stated at the beginning of our answer to the third question, then the Mandate cannot be regarded as ever having been a treaty or convention at all—except that the possible qualification regarding the compromissory clause in Article 7 should again be mentioned here, as we have discussed it above, in relation to the alternative view stated in answer to the third question.

We say further in answer to this question that the Covenant was a treaty or convention; but on the alternative view in question—the one stated in answer to the third question—Annex B would not be part of such a convention, just as any other resolution of the Council

or of the Assembly of the League could not be regarded as part of the Covenant.

In the light, then, of the above answers to the questions put, our answers to the final questions are as follows Mr. President:

Question A : "Who in 1920 were the parties to any treaty or convention by virtue of which the Mandate was conferred upon the Respondent upon the terms or provisions set out in the Declaration?"

Our answer is: if Annex B constituted a treaty or convention, the parties were on the one hand the Mandatory and on the other hand the League of Nations and/or its Members as such (as set out in our oral statements and our Preliminary Objections, especially at pages 307 to 312 (I) of the latter); that is on the qualification "if Annex B constituted a treaty or convention", the significance of that qualification appearing from what we have stated before in answer to the other questions.

Question B: "If States, Members of the League, were parties to such treaty or convention:

(1) Was the treaty or convention registered under the provisions of Article 18 of the Covenant and the machinery for registration established by the League? If so, by whom was it registered and to whom was the certificate of registration issued?

(2) If not registered, what significance, if any, is to be attached to the fact of non-registration?"

Our answer is (1): Annex B was not registered as a treaty or convention under Article 18 of the Covenant, as is apparent from the *League of Nations Treaty Series*, the official name being *Publication of Treaties and International Engagements registered with the Secretariat of the League of Nations*. The publication is available in the Carnegie Library and we have checked this matter in that publication.

Secondly, that is, as to question 2 under B, the fact that Annex B was not registered seems to indicate that it was neither intended to be nor regarded as a treaty or convention when adopted by the Council of the League, inasmuch as the effect of non-registration was, in terms of Article 18 of the Covenant, that a treaty or convention would not be binding.

In any event, we submit that the effect of non-registration would appear to be—we do not put it higher than that—that the Mandate, either as a whole or as regards any portion thereof, for example, Article 7, could not have been "in force" at any time as a treaty or convention.

These, Mr. President, are our answers to the questions; and in the light of those answers, and in order to enable the Court to give full consideration to the alternative possible views set out therein, our Submissions will require some amendment. That will be dealt with by my learned friend and Agent, Dr. verLoren van Themaat.

I thank the Court again for its courtesy and consideration, which has made the experience of appearing before it a very pleasant one.

Le PRÉSIDENT: Maintenant je donne la parole à Monsieur l'agent de l'Éthiopie et du Libéria pour sa réponse aux questions posées par les Membres de la Cour.

Mr. GROSS: Mr. President and Members of the Court, first, the Agent for the Applicants has taken note that on 17 October 1962, Judge Basdevant drew the Agent's attention to the use he had made of the expression *locus standi* at the end of the hearing on 16 October. The Agent for Ethiopia and Liberia would like to take this opportunity to state that the phrase *locus standi* was used as a convenient and informal method by which we referred to the Applicants' right and capacity, in these cases, to invoke the compromissory clause of Article 7 of the Mandate. As M. le Président, Judge Basdevant, pointed out, the phrase appears neither in the Statute of the Court nor in the Mandate. Our use of the phrase was not intended in any sense or significance other than as I have explained.

During the hearings on the South West Africa cases on 17 October 1962, Judge Sir Percy Spender addressed to the Parties certain questions with the request that they direct specific attention to them and answer them in as precise a form as possible.

Question 1

The answer to both inquiries embodied in the first sentence is in the affirmative. The answer to the second sentence of Question 1 is that the fact of prior agreement is recorded in paragraphs 2 and 3 of the preamble of the Declaration of the Council of the League of Nations, as set forth in Annex B of the Applicants' Memorials.

Comment on the foregoing answers:

Prior to any action taken by the Council of the League, the designation of the Mandatory had already been decided upon. The decision was made by the Principal Allied and Associated Powers, acting through the Supreme War Council, and occurred on May 7, 1919. The fact of this decision is recorded, *inter alia*, in Part V, *Foreign Relations of the United States* (Paris Peace Conference 1919, at pp. 506-608.)

The Applicants are unaware of any place in which the fact of prior agreement or decision on the terms or provisions of the Mandate is explicitly recorded, other than in the preamble referred to above.

The agreement of the Mandatory to submit to the compulsory jurisdiction of the Court in accordance with the terms of Article 7 of the Mandate is set forth in Article 7 itself, which is the only Article in the Mandate commencing with the words "The Mandatory agrees".

Question 2

The response to part *(a)* is in the negative.

The response to part *(b)* is in the negative.

With respect to the inquiry embodied in the last sentence of Question 2, the response is also in the negative.

Question 3

The response is in the affirmative.

Comment:

(a) It is agreed by the Parties to the present proceedings that the Declaration by the Council (Annex B of the Memorials) is *in itself* a treaty or convention. Relevant citations appear *passim* in the Preliminary Objections, Observations, and oral statements of Counsel for all the Parties, as well as in Respondent's first submission that the Mandate is "no longer" a treaty or convention in force.

(b) President Wilson's Third Draft Proposal for the Covenant of the League of Nations, paragraph III, provided that the "degree of authority, control or administration to be exercised by the mandatory State or Agency shall in each case be explicitly defined by the League (later "Council" was substituted for "League") *in a Special Act or Charter* which shall reserve to the League complete power of supervision and of intimate control, etc." (This is quoted in the Verbatim, at page 26, *supra.*)

The reference to "Special Act or Charter" appears to be significant. In the text of many Mandates, it will be seen that the word "declaration" (or in the French text, "*exemplaire*") is replaced by the word "instrument" (or in the French text, "*acte*"). I remind the Court that in the draft of President Wilson the reference is to a Special Act or Charter which is to embody the undertaking.

Hence it is clear that the Mandate "instrument" or "declaration", as the terms are used interchangeably, corresponds to the "Special Act or Charter" envisaged in the draft proposal of President Wilson, which I have quoted.

The "declaration" or "instrument" was the formal Act of the Council of the League which embodied and evidenced the agreement between the Mandatory Powers, on the one hand, and the other Members of the League, on the other, the Council of course acting for the latter.

(c) The Permanent Court in the *Mavrommatis* case, at page 35, as is clear from the context, described Article 26 of the Palestine Mandate as an "international agreement".

(d) As appears from the Court's Opinion in the *Mavrommatis* case, at page 11, Great Britain agreed that "Article 26 of the Mandate falls within the category of matters specially provided for in Treaties and Conventions in force."

(e) Article 80, paragraph 1, of the United Nations Charter refers in its final clause to the "terms of existing international instruments to which Members of the United Nations may respectively be parties". The history of Article 80, paragraph 1, as well as the reference in Article 77, paragraph 1 *(a)*, of the Charter to "territories now held under Mandate", show that the word "instrument" in Article 80, paragraph 1, refers to the Mandate "instrument" or "declaration" with respect to the Mandates, as it is alternatively described in the Mandates themselves.

Article 80, paragraph 1, shows that the *Members of the United Nations* were regarded as "parties" to these "instruments". Any "instrument" which has "parties" is, *ex hypothesi*, an "agreement".

(f) In the Advisory Proceedings, the Separate Opinion in 1950 of Judge McNair and the Majority Opinion—the former specifically and the latter inferentially—treated the compromissory clause of Article 7 of the Mandate as a "treaty or convention in force". The reference to the inferential use by the Majority Opinion refers to the phrase "having regard to Article 37 of the Statute of the International Court of Justice" which is the phrase used by this honourable Court in referring to the compromissory clause in the 1950 Advisory Opinion.

Question 4

In the light of the response to Question 3, *supra*, the inquiry embodied in the first sentence of Question 4 is not required to be answered.

Question A

Respondent, specifically, and all other States who were at that time Members of the League of Nations were such parties.

Question B

(1) The response to the inquiry embodied in the first sentence of Question B (1) is in the affirmative.

The response to the inquiry embodied in the second sentence of Question B (1) is as follows: The Declaration contained in Annex B to the Memorials was ordered by the Council of the League of Nations to be deposited in the archives of the League of Nations. The Council also ordered that certified copies were to be forwarded by the Secretary-General of the League of Nations to all Powers signatories of the Treaty of Peace with Germany.

Applicants have not received specific information concerning the date or circumstances of the actual deposit of the Declaration. That such deposit was in fact made, however, is evidenced by the fact that certified copies were duly forwarded by the Secretary-General of the League of Nations on 17 February 1921 to all Powers signatories to the Treaty of Peace with Germany.

Applicants have not received information whether a "Certificate of Registration" was issued.

Comment:

The Council of the League of Nations established at least two procedures for the registration of treaties. Special provision was made for treaties which were placed under the care of the Secretary-General of the League. (This may be seen from a memorandum approved by the Council of the League of Nations, meeting in Rome on May 19, 1920, set forth in *League of Nations Treaty Series*, Vol. 1, Number 1, at p. 9.)

Moreover, orders by the Council pertaining to the deposit of Mandate Declarations (or Instruments) and the transmittal of certified copies thereof, in purpose and effect constituted a registration procedure appropriate to the registration of Mandates. The procedure which was followed made the Mandates public documents, thereby accomplishing the objectives of Article 18 of the Covenant of the League of Nations.

(2) In the light of the response to Question B (1), *supra*, this question does not appear to require an answer.

Question C

Respondent, specifically, as well as all other States which were Members of the United Nations at the date of the Applications in these proceedings, and/or Members of the League of Nations at the time of its dissolution were such parties.

Respectfully submitted. Thank you, Mr. President.

Le PRÉSIDENT: Maintenant, je donne la parole à M. l'agent de la République sud-africaine.

Dr. VERLOREN VAN THEMAAT: Mr. President, for the reasons indicated in our answers to the questions of Sir Percy Spender, and with the leave of the Court, we hereby amend our Submissions by substitution of the following paragraph for the paragraph commencing with the word "Firstly":

> "Firstly, the Mandate for South West Africa has never been, or, at any rate is since the dissolution of the League of Nations 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 Mandate as a whole, including Article 7 thereof; and
>
> *(b)* in any event, with respect to Article 7 itself."

We will hand over the full text of our amended Submissions to the Registrar.

I thank the Court.

Le PRÉSIDENT: M. l'agent de l'Éthiopie et du Libéria voudrait-il énoncer des amendements à sa conclusion?

Mr. GROSS: Mr. President, the Agent for the Applicants does not wish to amend its Submissions, but respectfully requests leave of the Court to file the conclusions in written form within time-limits fixed by the Court on the subjects which have been introduced by the Respondent, and in particular by reason of the amendment which Respondent has made of its Submissions.

Le PRÉSIDENT: De toute façon ce délai, si la Cour l'accorde, ne sera pas considérable.

M. l'agent de l'Éthiopie et du Libéria voudrait-il lire ses amendements ou ses conclusions amendées en audience publique?

Mr. GROSS: Mr. President, we do not intend to amend our Submissions. We would like to reserve the right to submit conclusions in the light of the amendments which have now been made by the Respondent in its Submissions. We do not ourselves intend to amend our Submissions. In reserving this right, Mr. President, it is our feeling that in view of the fact that, by response to, or in the form of a response to, the questions raised by Judge Sir Percy Spender, a substantive issue may be presented which we should like to study. It is simply a reservation of the right to submit comments and conclusions with respect to that Submission

that Applicants respectfully request. If, upon study within a short time-limit set by the Court, Applicants conclude that no such memorandum or comments are necessary, we shall advise the Court through the Registrar and not take advantage of the right which we have reserved.

Le PRÉSIDENT: Alors, dans ces conditions-là, je ne déclare pas encore la procédure orale close et je prierai les agents des Parties de se tenir pendant un certain temps à la disposition de la Cour pour le cas où elle voudrait leur demander des éclaircissements supplémentaires.

Les Parties seront avisées de la décision de la Cour en ce qui concerne l'audience éventuelle.