JOINT DISSENTING OPINION OF SIR PERCY SPENDER AND SIR GERALD FITZMAURICE

I

Since we find ourselves unable to concur in the decision of the Court, it is necessary that we should state the reasons for our dissent.

The case is one of special importance. It involves not only a fundamental question of judicial approach; it is as well one which presents quite exceptional difficulties—a fact reflected by the narrow majority on which the decision rests.

These difficulties are not merely technical, though these exist. They spring rather from the fact that the case belongs to a type the outcome of which is liable to be dominated, or at least strongly influenced, by the character of the initial approach to it.

In order to assume jurisdiction, the Court had not only to reject *all* the objections formally presented by the Respondent but also certain others. These we shall mention in due course.

The Court has, in our opinion, only been able do this by adopting premises which, as will emerge from what we have to say, largely assume beforehand the correctness of the conclusions arrived at.

The general approach adopted by the majority of the Court in the present case can, we think, reasonably, be described as follows—namely that it is desirable and right that a provision for the compulsory adjudication of certain disputes, which figures (or did figure) as part of an institution—the Mandate for South West Africa—which is still in existence as an institution, should not be held to have become inoperative merely on account of a change of circumstances—provided that this change has not affected the *physical* possibility of continued performance. The present Court exists, and is of the same general character and carries out the same kind of functions as the tribunal (the former Permanent Court) which originally had jurisdiction under this provision (i.e. Article 7 of the Mandate for South West Africa). Since there still exist States (and amongst them the Applicant States) who would have been entitled to invoke Article 7 *before* the changed circumstances came about, this Article must now be interpreted as still giving them this right, notwithstanding anything

to the contrary in its actual terms, or resulting from any other relevant factor.

It is evident that once a tribunal has adopted an approach of this nature, its main task will be to discover reasons for rejecting the various objections or contra-indications that may exist, or arise.

We have felt unable to adopt this approach. In our opinion, the only correct method of procedure is to begin by an examination of the legal elements, with especial reference, where questions of interpretation are concerned, to the actual language employed, and then, on the basis of this examination, to consider what are the correct conclusions which, as a matter of law, should be drawn from them. It is in this spirit that we have approached our task.

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We are not unmindful of, nor are we insensible to, the various considerations of a non-juridical character, social, humanitarian and other, which underlie this case; but these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view. They do however lead us to draw attention to another aspect of the matter.

A Court called upon to consider objections to its jurisdiction must exclude from consideration all questions relating to the merits of the dispute, unless the jurisdictional issues are so intertwined with the merits that they cannot be considered separately, and must be joined to the merits. It is nevertheless legitimate for a Court, in considering the jurisdictional aspects of any case, to take into account a factor which is fundamental to the jurisdiction of any tribunal, namely whether the issues arising on the merits are such as to be capable of objective legal determination.

It is apparent from the Memorials in the present case, that what the Court will principally be asked to decide on the merits is whether, in a number of different respects, the Respondent State, as Mandatory, is in breach of its obligation under Article 2 of the Mandate to "promote to its utmost the material and moral well-being and the social progress of the inhabitants of the territory...". There is hardly a word in this sentence which has not now become loaded with a variety of overtones and associations. There is hardly a term which would not require prior objective definition, or redefinition, before it could justifiably be applied to the determination of a concrete legal issue. There is hardly a term which could not be applied in widely different ways to the same situation or set of facts, according to differing subjective views as to what it meant, or

ought to mean in the context; and it is a foregone conclusion that, in the absence of objective criteria, a large element of subjectivity must enter into any attempt to apply these terms to the facts of a given case. They involve questions of appreciation rather than of objective determination. As at present advised we have serious misgivings as to the legal basis on which the necessary objective criteria can be founded.

The proper forum for the appreciation and application of a provision of this kind is unquestionably a technical or political one, such as (formerly) the Permanent Mandates Commission, or the Council of the League of Nations—or today (as regards Trusteeships), the Trusteeship Council and the Assembly of the United Nations. But the fact that, in present circumstances, such technical or political control cannot in practice be exercised in respect of the Mandate for South-West Africa, is not a ground for asking a Court of law to discharge a task which, in the final analysis, hardly appears to be a judicial one.

The above considerations, in our opinion, strongly reinforce the view which, on other grounds, we have taken as to the third preliminary objection, namely that disputes about the conduct of the Mandate in relation to the "sacred trust" (as opposed to disputes about the individual statal interests of the Members of the League under the terms of the Mandate) are not the kind of disputes to which the compulsory adjudication clause of the Mandate was intended to, or did, apply.

* * *

We now turn to the substance of the case in its present phase, which involves the question of the competence of the Court to proceed to the merits; and by way of introduction we would say that our conclusions in this phase have been reached against the background of four major principles of law which we believe to be fundamental to any determination of the issues involved. They are:

1. The principle of consent as the essential condition for founding international jurisdiction. Such consent may be given generally, in advance, or *ad hoc*, and may in a proper case be held to have *been* given. But that it was in fact given, and that it covers the actual case before the Court, must be objectively demonstrated, and cannot simply be presumed.

2. The principle that rights conferred on or vested in persons or entities in a specified capacity, or as members of a specified

class, are not conferred on or vested in them in their personal or individual capacity, and therefore cease to be available to them if they lose the specified capactiy, or cease to be members of the indicated class; and are equally not available to them in a different capacity, or as members of another class.

3. The principle that provisions are *prima facie* to be interpreted and applied according to their terms, where these are clear and unambiguous in their expression of the intention of the parties, and that such terms can only be ignored or overridden (if at all) on the basis of some demonstrably applicable legal principle of superior authority. The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions.

4. The principle that a Court of law cannot correct the past errors or omissions of the parties, and that it is not the province of a Court to place some of the parties in the same position as they would have been in if they had taken action they could have taken, but did not take, and even deliberately avoided taking.

In our opinion, the judgment of the Court fails to give expression to these principles, either ignoring them or advancing no adequate grounds for departing from them—as in our view it clearly does. In the Anglo-Saxon legal tradition there is a well-known saying that "hard cases make bad law", which might be paraphrased to the effect that the end however good in itself does not justify the means, where the means, considered as legal means, are of such a character as to be inadmissible.

It is because of the foregoing considerations, and as Members of a Court whose task it is under Article 38, paragraph 1, of its Statute, "to decide in accordance with international law", that we are unable to accept the reasoning on which the Judgment of Court is based.

II

STATEMENT OF THE ISSUES INVOLVED

Although the issues now involved are stated in the Judgment, their real character is not we think sufficiently brought out there, and we propose briefly to re-state them in our own way.

The jurisdiction of the Court is fundamentally derived from Article 36, paragraph 1, of the Statute of the Court, which en-

ables the Court to hear any cases referred to it by the parties [i.e. jointly] or any cases "specially provided for ... in treaties or conventions in force". But whether in any particular case that jurisdiction can be exercised *compulsorily* depends on factors lying outside this provision—for instance the existence of a Declaration under paragraph 2 of Article 36 (the "Optional Clause") or the terms of a provision for compulsory adjudication by the Court contained in some treaty or convention in force. It is for this reason that the Applicant States have invoked the jurisdiction of the Court on the basis of the combined effect of Article 7 of the Mandate for South West Africa and of Article 37 of the Statute of the Court. The reason for citing the latter provision, which is really mechanistic in character, is that the original forum for the settlement of disputes arising under Article 7 of the Mandate was the predecessor of the present Court, the former Permanent Court of International Justice, which ceased to exist in 1946. This latter Court was equally the forum specified in the adjudication clauses of many other international instruments. In our view, the effect of Article 37 of the Statute of the present Court—and its sole relevant effect in the context of this case—was (as between the parties to the Statute) to substitute the present Court for the former Permanent Court in all cases in which under a "treaty or convention in force", the Permanent Court *would have had* jurisdiction and would have been competent to hear and determine the case. Its relevant portions read as follows:

> "Whenever a treaty or convention in force provides for reference of a matter 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."

We draw attention to the similarity of wording between this provision and Article 36, paragraph 1, of the Statute, in so far as each relates to treaties and conventions in force. This has a significance we shall mention later.

It is, however, clear that, whatever may be the correct interpretation to be given to the phrase "a treaty or convention in force", Article 37 can, on the face of it, only apply to adjudication clauses contained in instruments which are in law treaties or conventions, and which also are as such, i.e. as treaties or conventions, "in force". Only in the case of clauses figuring in instruments fulfilling these conditions is the present Court substituted for the former Permanent Court.

The first contention of the Respondent State is that the relevant instrument—the Mandate for South West Africa—does not fulfil either of these conditions, that it neither has the character of a treaty or convention nor, if it has, is it any longer in force.

It is evident, in any case, that Article 37, however applicable it may otherwise be, does not and could not, standing alone, confer jurisdiction on the Court, for on the face of it, it only applies to cases in which the Permanent Court would have had jurisdiction. To ascertain whether this would have been so in the present case, reference must accordingly be made to the clause which is invoked by the Applicant States as being the one which provided for recourse to the Permanent Court, namely Article 7 of the Mandate for South West Africa. The relevant parts of this provision read as follows:

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

This provision clearly conditions the obligation in three, or perhaps four, ways: there must be a "dispute"; this dispute must arise between the Mandatory and "another Member of the League of Nations"; it must relate to "the interpretation or ... application of the provisions of the Mandate"; and, finally, it must be such as "cannot be settled by negotiation". We stress the word "cannot".

The issues arising out of these conditions—whether as actually formulated by the Respondent State, or as being inherent in the terminology of Article 7 (stated in the order in which it will be convenient to deal with them)—are as follows:

1. If there is a dispute, is it a dispute between the Mandatory and "another Member of the League of Nations"—or in other words have the Applicant States the *capacity* to invoke Article 7?

2. If the Applicants have such capacity, is there really any genuine dispute at all between them, as such, and the Respondent State—and what ought to be understood by a dispute for this purpose;—for instance *(inter alia)* are the Applicants, as parties to the present proceedings, also parties to the real dispute which exists?

3. If the Applicants are not only the parties to these proceedings, but also the parties to the dispute with the Respondent State, is this dispute of the kind to which Article 7 relates?

4. Have there been any negotiations at all, properly speaking, with a view to settling the particular dispute between the Applicants and the Respondent?

5. Can it be held that the dispute "cannot" be settled by negotiation?

* * *

We shall consider the various issues that arise in the following order:

First—the two issues arising on Article 37 of the Statute: is there a "treaty or convention", and if so, is it "in force" as such?

Secondly—the primary question arising on Article 7 of the Mandate, namely have the Applicant States the capacity to invoke it?

Thirdly—the various issues about the existence of a dispute, genuinely between the Applicants as such and the Respondent, and if there is one, as to its character in relation to Article 7.

Fourthly—the various issues about negotiation—has there been any negotiation of the kind contemplated by Article 7, and if so can the conclusion be drawn that the dispute "cannot" be settled by negotiation?

These four issues or classes of issues correspond broadly, though not identically, with the four specific preliminary objections to the jurisdiction of the Court raised by the Respondent State.

Before we deal with them, however, we find it necessary to say something about the relevance to these issues and objections, of the Advisory Opinion about the status of the Mandate for South West Africa, and related matters, which the Court gave on 11 July 1950.

III

THE ADVISORY OPINION GIVEN BY THE COURT IN 1950

We are most reluctant to devote any space to the 1950 Opinion, as we shall call it [1]. We believe that Opinion was wrong in one or two important aspects, but by no means in all. But this belief has not affected our views in the present case, because we think that different issues are now involved. We are compelled to make this clear because, in the first place, the Judgment of the Court is partly founded on the 1950 Opinion; and secondly, the relevance of that Opinion was much debated in the arguments of the Parties to the present proceedings. The Applicants maintained both that the 1950 Opinion was correct in all respects and that (though not on any basis of *res judicata*) it completely and automatically governed the issues arising in the present proceedings. The Respondent State

[1] This Opinion of the Court, on the first specific question submitted to it, is divisible into three parts: that which deals with Articles 2 to 5 of the Mandate, that which deals with Article 6, and that which deals with Article 7. Its reasoning on each of these two latter articles appears to rest upon quite separate and distinct grounds.

denied this and also adduced material claimed to be new and such as, had it been available in 1950, would have caused the Court to find differently. The Applicants, in reply, denied both that the material was new, or that it would have had any influence on the views of the Court.

We regard most of this discussion as having been misplaced. Some of the issues now arising (those connected with the third and fourth preliminary objections) did not arise at all, and could not have arisen, in the course of the 1950 proceedings, which were not, as these are, contentious proceedings. As regards one of the central issues arising in 1950, namely that of the status of the Mandate as an international *institution*, the Court in 1950 did little more than find, on various grounds, that the dissolution of the League of Nations had not caused the Mandate to lapse, and that despite this dissolution, the Mandate was still in force. But the Court did not specifically address itself to the question of the basis upon which the Mandate was in force nor, in particular, to whether it was still in force *as a treaty or convention*. In the dispositive of its 1950 Opinion, the Court did no more, in relation to the present context, than state that by reason of Article 37 of the Statute, the present Court was substituted for the former Permanent Court; but both there, and in the very brief references to Article 37, and to Article 7 of the Mandate, made in the body of the Opinion, the Court seems to have assumed the existence of the necessary conditions without going into that matter. The little that was said provides no real assistance, and this was necessarily so since no jurisdictional issue of any kind was before the Court in 1950. Assumptions apparently made without any reasoning as to, or consideration of, the specific underlying issues involved, in an Advisory Opinion directed chiefly to other matters not involving any concrete jurisdictional question, clearly do not constitute a sufficient basis on which to found jurisdiction in subsequent contentious proceedings in which these issues are now directly raised.

In the same way we think that the 1950 finding of the Court, to the effect that the Assembly of the United Nations was entitled to exercise the supervisory functions of the former League Council under Article 6 of the Mandate, is equally irrelevant to the present proceedings, which do not involve any specific issue of "devolution", "inheritance" or "carry over"—much as these matters have been discussed in the arguments of the parties. We repeat that the issue now before the Court is a purely jurisdictional one. The jurisdiction of the Court could not be *presumed* on any merely devolutionary basis. The existence of Article 37 is alone enough to show that. The jurisdiction of the Court as successor to the Permanent Court, was provided for expressly by the combined operation of Articles 36 and 37—or else it does not exist at all. No one contests

that Article 37 substitutes the present for the former Court, provided that the conditions specified in Article 37 are fulfilled at the moment jurisdiction is invoked. The question is are they here fulfilled? Equally no-one doubts that Article 7 of the Mandate contains an obligation to have recourse to adjudication, provided the conditions specified in it are fulfilled. Again the question is, are they?

These are quite different issues, in our opinion, from those which were before the Court in 1950, and accordingly we shall endeavour to deal with the jurisdictional issues in the present case entirely on their own merits.

IV

THE FIRST PRELIMINARY OBJECTION

Having regard to the view we take on the third Preliminary Objection, namely that Article 7 was only intended to safeguard the individual interests of League Members in the Mandated territory, conferred under the terms of the Mandate, and did not cover disputes about the conduct of the Mandate, much of the discussion on the first preliminary objection (as also the second) has for us a certain unreality, since these objections are hardly meaningful, and are in any event unnecessary, in the context of this case, if Article 7 does not relate to the conduct of the Mandate. We therefore discuss these objections on the assumption that it does, merely pointing out that a great deal which is obscure regarding these objections becomes clear on the opposite view, which is ours.

1. *The burden of proof. The duty of the Court itself to be satisfied that jurisdiction is conclusively established*

In order that our attitude as to the character of the Mandate, and in regard to the first Preliminary Objection, should not be misunderstood, we must begin by recalling that, since the burden of establishing the jurisdiction of the Court lies on the party asserting it, and this must be established conclusively, it follows that it is for the Applicants to show that the Mandate is beyond reasonable doubt a "treaty or convention in force" for the purposes of Articles 36 and 37 of the Statute. Moreover, quite apart from any question of onus of proof, a duty lies upon the Court, before it may assume jurisdiction, to be conclusively satisfied—satisfied beyond a reasonable doubt—that jurisdiction does exist. If a reasonable doubt—and still more if a very serious doubt, to put it no higher—is revealed as existing, then, because of the principle

of consent as the indispensable foundation of international jurisdiction, the conclusion would have to be reached that jurisdiction is not established. In short, the doubt would, according to the normal canons for the interpretation of jurisdictional clauses, have to be resolved against the existence of jurisdiction.

*

In what follows, we reach the conclusion that, while there may be room for some, even considerable, argument, the better view is that the Mandate did not have the character of a treaty or convention; that Article 7 of the Mandate cannot properly be considered in isolation from the rest of the Mandate as having some sort of treaty character of its own, independently of the instrument it is embodied in; and that even if either the Mandate, or Article 7 separately considered, had such a character, neither is any longer in force on a treaty basis. We wish nevertheless to make it quite clear that our final conclusion on the first preliminary objection does not rest upon these factors alone. It rests also upon the simple fact that no onus lies upon the Respondent State to *disprove* the past and present treaty character of the Mandate or of Article 7. The onus lies upon the Applicants of establishing that character beyond reasonable doubt, since this goes to the root of jurisdiction. The duty lies equally upon the Court of being affirmatively satisfied to that effect.

In our opinion, an examination of the record in these proceedings, and of the oral arguments presented, shows that even on the most favourable assessment of the considerations that can be adduced in support of the view that the Mandate or Article 7 was and is a "treaty or convention in force", very serious doubt—to say the least of it—must remain as to whether this really is the case. On this ground alone, the first Preliminary Objection should be held good, even if there were not more positive reasons for doing so.

* * *

2. *Was the Mandate a treaty or convention?*

(a) *Legal nature of a treaty or convention*

Before considering the character of the Mandate, which will involve stating, as briefly as we can, the salient features of the process by which it was brought into being, there are some preliminary points of law that must be referred to.

We do not adopt a narrow or doctrinaire view as to what is comprised by the term "treaty or convention". We are not—or at least so we hope—guilty of the solecisms either of supposing that treaties or conventions are only what are actually labelled as such, or of

confusing an international agreement as an act, with the particular instrument in which it is embodied. We give the widest connotation to the notion of treaty or convention as covering everything that constitutes or embodies an international agreement, whatever its form, style or nomenclature—any agreement, formal or informal.

But while international law takes, and rightly takes, a liberal view of what constitutes a treaty, convention or other form of international agreement, the notion is not an unlimited one. It is not synonymous, as the Judgment of the Court might almost lead one to suppose, with international acts and instruments generally. Thus, in its final draft on the "Conclusion, Entry into Force and Registration of Treaties" completed earlier this year (Document A/CN. 4/148 of 3 July 1962), the International Law Commission of the United Nations adopted the following definition of a treaty, with which we associate ourselves:

> " 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation [here follows a list of some dozen possible appellations including of course 'convention', 'agreement' and 'declaration'], concluded between two or more States or other subjects of international law and governed by international law."

It will be seen that this concept of what constitutes a treaty, though wide, is not a limitless one. We draw attention in particular, in the context, to the phrases "in written form" and "concluded between two or more States or other subjects of international law"[1]. Thus a verbal agreement, while it might be held *binding* (see the Ihlen Declaration in the *Eastern Greenland* case, P.C.I.J.

[1] A subsidiary point, which we accordingly place in a footnote, is that if, contrary to our view, the Mandate for South West Africa would otherwise have been in the nature of a treaty or convention, an objection to this conclusion could be based on the character of the parties to the Mandate agreement (if it was one). As we shall demonstrate later, the only entity other than the Mandatory itself which could have ranked as a party would have been the League of Nations or the Council of the League acting for it. But it is by no means certain that in 1920 (when the Mandate was formulated) international legal opinion would have accepted the conclusion arrived at by the present Court in the *Injuries to United Nations Servants* case (*Reports 1949*, p. 174) that international organizations could have a legal personality separate and distinct from that of their Members, and rank as entities "subjects of international law". If not, then, considered in the light of contemporaneous legal thinking, the Mandate could only have ranked as a treaty or convention if the parties to it were *States*. Our view is that the only State which could have been a party to the Mandate, if it was a treaty or convention, was the Mandatory, and this would mean (on the above premises) that the Mandate was not a treaty or convention at all, because not concluded between "two or more States". We deal with this further later.

Reports, Series A/B, No. 53, at pp. 69 *et seq.*), would not be a treaty or convention. *Nor would a statement (e.g. of intention) made, or an assurance given, in the course of, say, a speech at an international conference or assembly, be a treaty or convention.* A declaration containing a unilateral assumption of obligations would not be an international agreement at all, since an international agreement must be concluded between "two or more" parties.

The quasi-treaty character which "optional clause" declarations made under paragraph 2 of Article 36 of the Statute are sometimes said to possess, would arise solely from the multiplicity of these declarations and their interlocking character, which gives them a bilateral or multilateral aspect. A single such declaration, if it stood quite alone, could not be an international *agreement*. Optional clause declarations are clearly not covered by the words "treaties or conventions" in paragraph 1 of Article 36, or there would have been no need for paragraph 2, except perhaps for reasons of convenience or emphasis. If a State making a declaration of willingness to accept the jurisdiction of the Court compulsorily for certain classes of disputes were held thereby to have entered into a treaty or convention, a dispute of the class specified would rank as a matter "specially provided for" in "treaties or conventions in force" within the meaning of paragraph 1. We have already drawn attention to the similarity of wording between Article 37 of the Statute and Article 36, paragraph 1, in the reference to treaties or conventions in force. The term was clearly intended to mean the same in both places, and we cannot see why it should be given a more extended meaning in the one than in the other. This will have a further significance when we come later to consider whether Article 7 of the Mandate could be detached from it and considered as an isolated declaration having treaty character.

The foregoing points involve some of the most important questions of law arising on this part of the case. The Judgment of the Court in effect identifies the idea of an international agreement with any act or instrument embodying, or giving rise to, international obligations, or which contains or involves an international "engagement". This we believe to be a fallacy, as the above examples show, and others could be adduced. To take again the case of unilateral engagements, these may as already mentioned have a quasi-treaty character when they interlock with one another, or interlock with provisions of an existing treaty (as in certain of the *Minorities* cases). Otherwise they must necessarily lack the element of the bilateral or multilateral essential to give anything treaty character.

These are merely some examples. In brief, the assumption that it suffices if an international obligation exists, is to beg the whole question at issue, and to assume what has to be demonstrated; for no one has ever contested that the Mandate gave (and so long as it continues in force as an institution gives) rise to international obligations. But that does not of itself make it a treaty, convention or other form of international agreement. It cannot be too strongly emphasized that the test is not, or is not merely, the creation of international obligations, *but the character of the act or instrument that gives those obligations their legal force.* This is the essential point which, in relation to the Mandate for South West Africa, has to be investigated in this part of the case.

Nor, as we said earlier, and as we believe is evident, are we making the elementary mistake of confusing or identifying the instrument embodying or evidencing an international act, with the act itself. Although it will frequently be convenient to speak of the instrument that embodied the Mandate for South West Africa as "the (or as being the) Mandate", we shall not thereby be meaning that the Mandate consists of the original piece of paper on which it was written out in Geneva and which was deposited in the Archives of the League of Nations on December 17, 1920. What we understand by the Mandate is not this piece of paper, but the international act that gave rise to it, namely, in our view, the Resolution of the Council of the League of the same date. What has to be investigated is the nature of this Resolution and whether it had a treaty or conventional character.

Finally, before we pass on to this investigation, we wish to refer to evidence contemporary with Articles 36 and 37 of the Court's Statute in order to show that, quite apart from the legal principles we have been discussing, and others we shall come to later—as also the normal rules of legal interpretation—it could not be permissible to read the term "treaties or conventions" in these Articles as having a connotation more extensive than that of international agreements; for this evidence shows that when something wider and more inclusive than instruments of a conventional character was intended, this could be and was indicated in terms. For instance, Article 80, paragraph 1, of the Charter, upon which so much reliance has been placed by the Applicants in this case, states *(inter alia)* that nothing in Chapter XII of the Charter "shall be construed ... to alter in any manner ... the terms of existing *international instruments...*", etc. (italics ours). Indeed, this phrase may well have been employed in Article 80 expressly with the Mandates in mind *(inter alia)*. Had wording similar to that italicized in this passage been used in Articles 36 and 37, no doubt would have existed that the Mandate was covered, whatever view might be taken as to the character of that act or instrument. Similarly, in the United Nations Assembly Resolution of February 12, 1946, providing for the transfer of certain

League assets and the assumption of certain League functions, that part which related to the possible transfer of political functions, including such functions as the supervisory functions of the League Council under Article 6 of the Mandate (though it did not actually transfer these, or any other political functions, nor were any assumed by the United Nations) was styled, and referred to as "treaties, international conventions, agreements *and other instruments having a political character*" (italics ours). Here again, if some similar phrase, such as "treaties and other international agreements and instruments", had been employed in Article 37, no doubt would have existed.

These facts, and the principle of consent as the basis of international jurisdiction, make it legally inadmissible as against the Mandatory to interpret the words "treaty or convention" in Article 37 as if it had a wider extension, and in particular as if it covered *any* instrument containing an adjudication clause, irrespective of the conventional character of that instrument. It is therefore necessary to establish strictly that the Mandate has that character.

We recognize in this connection that it may be tempting to regard an instrument containing an adjudication clause (particularly one worded like Article 7—"The Mandatory agrees...", etc.) as being *pro tanto* of a conventional character. We do not however think it possible or legitimate to detach and isolate one provision of an instrument, ascribe a treaty character to it and then, on that basis, deem a similar character to be thereby imparted to the whole instrument. Article 7, standing on its own, could not be a "treaty or convention" for the purposes of Article 37 of the Statute, for an adjudication clause, standing on its own, and apart from the context in which it occurs, is meaningless and can have no real existence. It could not be interpreted, and certainly could not be applied in isolation. The fact that it is in the instrument may indeed be a pointer to the character of the latter, may afford some evidence as to the nature of the instrument: but that is all. Moreover, it would seem that if one did detach Article 7 from the rest of the Mandate, it would then assume the character of a unilateral declaration involving a unilateral assumption of obligation, since the Mandatory alone gave the undertaking. Unilateral declarations may contain undertakings, and can certainly create valid international obligations; but, as noted above, they do not come within the category of treaties, conventions or other forms of international agreements, since they have no bilateral character.

With the above explanations of our approach in regard to some of the principal legal factors involved in this part of the case—

others will be left for later consideration—we proceed to a consideration of the Mandate itself.

* * *

(b) *The Mandate System*

The various mandated territories were all territories in Africa, the Middle East or the Pacific, sovereignty over which was renounced after the First World War by Germany or Turkey. But before considering what became of them, and in particular of German South West Africa, it is, we think, essential to distinguish clearly between the Mandates *System*, and the individual Mandates and their terms. Failure to do this has caused much confusion in this case. The former (the System) was the creation of Article 22 of the Covenant of the League of Nations. The latter, the Mandates themselves, were not. The principal functions performed by Article 22 were *(a)* to specify the general character and purposes of the System; *(b)* to distinguish between the various classes of Mandates ("A", "B" and "C" as they came to be called) setting out in broad outline what would be necessary in each type of case, in order to safeguard the interests of the mandated territory and its inhabitants [1]; and *(c)* to set up certain machinery to supervise the administration of the individual Mandates: thus reports were to be rendered by Mandatories to the Council of the League, and a Permanent Mandates Commission was to be constituted to receive these reports and advise the Council "on all matters relating to the observance of the Mandates".

But Article 22 did not itself confer any Mandates, appoint any Mandatories, or define the terms of any Mandates. This was done *aliter*, as will be seen. The remaining features of Article 22 that are of especial importance in the present context were as follows:

(1) It indicated that the Mandates were to be exercised by the Mandatories "on behalf of the League".

(2) It stated that the "well-being and development" of the peoples of the Mandated territories formed "a sacred trust of civilization"

[1] The "A" Mandates related to countries in the Middle East whose existence as independent nations could provisionally be recognized, and which needed only administrative advice and assistance from the selected Mandatory. The "B" Mandates related to less advanced territories in Central Africa which might eventually attain independence, but for the administration of which the Mandatory must meanwhile be responsible. The "C" Mandates related to South West Africa and certain Pacific territories which could "be best administered ... as integral portions" of the Mandatory's territory, and under its laws.

and that "*securities* for the performance of this trust should be embodied *in this Covenant*" (our italics).

(3) It provided (paragraph (8) of Article 22) that the "degree of authority, control, or administration" to be exercised by any Mandatory should, "*if not previously agreed upon by the Members of the League*" (our italics), be "explicitly defined *in each case* by the Council" (our italics).

Before passing on to the Mandates themselves, it is convenient to comment in particular on head (2) above. The "securities" (or guarantees or safeguards as they are variously called) for the performance of the sacred trust were to be embodied in the Covenant itself. The implication of this, according to normal principles of interpretation, was that any measure, obligation, etc., which was *not* provided for in the Covenant, could not rank as, or have the status of a "security" for the purposes of Article 22—or in other words it could not be considered as something essential to the functioning of the Mandates System as conceived of in Article 22. Moreover, Article 22 did not confer on the Council of the League any authority to add to the securities specified in that Article. The Council could, in effect, under paragraph 8 of Article 22, define the terms of particular Mandates and thereby impose obligations on the Mandatory, but not so as to give these the status of a "security", unless they were already specified as being securities in some provision of the Covenant.

These "securities" were of course set out in Article 22 itself. Certain paragraphs made provision, *inter alia*, for the avoidance of abuses such as the slave trade, the arms and liquor traffic, for demilitarisation, and so on. But the chief security or safeguard consisted in the provision made for reporting, and for the supervisory functions to be exercised by the Permanent Mandates Commission and the League Council.

Nowhere in Article 22, or elsewhere in the Covenant [1], is any corresponding provision made for what (though in our view erroneously [2]) has been called "judicial supervision" in respect of the

[1] Article 14 of the Covenant provided for the establishment of a Permanent Court of International Justice, but (apart from an advisory jurisdiction in relation to the Council and Assembly of the League) it was to be competent only to hear and determine disputes "which the parties thereto submit to it". Article 14 established no compulsory jurisdiction either in respect of Mandates or anything else. Any such compulsory jurisdiction had to be established specially. In the case of the Mandates, an obligation on the part of the Mandatory to submit to compulsory jurisdiction was not created by the Covenant, but by clauses of the various individual Mandate instruments.

[2] In our view "supervision" is not a judicial function except where the law specifically entrusts a supervisory function to the Courts, as mights be the case for instance, in the domestic field, where the welfare of infants and minors, or of persons of unsound mind is concerned. In contentious proceedings such as alone could take place on the basis of Article 7 of the Mandate for South West Africa, the function of the Court is to determine a specific dispute—an eminently judicial, not supervisory function.

conduct of the Mandates; and the deduction must therefore be drawn that, at any rate at this time (the period 1919-1920), provision for the compulsory adjudication of disputes about the Mandates was not regarded as an essential element of the system, and did not rank as a "security" for the performance of the sacred trust of civilization within the meaning of Article 22. The argument to the contrary rests we think on bare assertion and special pleading.

We are not concerned to argue whether it would have been a good thing or not that "judicial supervision" should have been one of the securities. Our duty is simply to note the fact and draw the necessary legal deductions from it. The point will recur, and of course if we are correct in our view on the *third* preliminary objection, it would only be natural that a provision for the judicial protection of the statal interests of League Members in the Mandated territories should *not* figure amongst the "securities" in Article 22.

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It will be evident from the foregoing summary of Article 22 that it was chiefly[1] concerned with defining and describing the nature of a certain trust, and of the system contemplated for carrying it out; with establishing certain safeguards to that end, in the interests of the inhabitants of the territories concerned; and with the provision of certain machinery in that connection. But it created no actual Mandates, and the performance by any given Mandatory of its duties in discharge of the Mandate conferred on it, and to be "exercised ... on behalf of the League", was to be left (see paragraph (8) of Article 22) to the explicit definition of the authority of the Mandatory, either by agreement between, or on the part of, "the Members of the League", or, in default of such agreement, by the Council of the League acting as such.

We therefore turn now to consider how, and in what manner and form, this explicit definition (which constituted the individual Mandate) was effected. We shall of course be doing so with reference to the case of the Mandate for South West Africa, but it should be noted that the method and form adopted (namely, a Resolution of the League Council) was exactly the same in the case of all the various Mandates, of whatever category, with the single exception of that for Iraq which, significantly enough and for special reasons, took the form of an actual and undoubted treaty (or treaties) between His Britannic Majesty and the King of Iraq. The importance of the uniform method of creation of all the other Mandates was that there was nothing in it peculiar to the case of South West Africa. Had the other Mandates been created by

[1] i.e. apart from "Equal opportunities for the trade and commerce" of Members of the League, which were reserved in the case of the "B" Mandates, missionary rights, etc.

acts or instruments that unquestionably were and took the form of international agreements, it might have been argued that the difference in the case of the Mandate for South West Africa was merely accidental or fortuitous, and that there being no real difference of kind between it and other Mandates (at any rate so far as the "C" category went, to which South West Africa belonged), it also should be held to be of the same nature, and equally to have treaty character. But this was not the situation.

* * *

(c) *The framing of the Mandate for South West Africa*

The initial steps (we shall not go into a lot of back history) leading to the issuing or promulgation of the Mandate for South West Africa were as follows:

1. The various Mandatories for the ex-German territories in Africa and the Pacific were nominated by the five Principal Allied and Associated Powers of the First World War, the United States of America, the British Empire, France, Italy and Japan (hereafter sometimes called the "Principal Powers"), in whose favour sovereignty over these territories was renounced by Germany under Article 119 of the Treaty of Versailles. It was basically they who decided to deal with these territories by placing them under Mandate as a sacred trust for civilization[1], though the System itself, as has been seen, was the creation of Article 22 of the League Covenant.

2. The actual transfer of the territories to the various Mandatories, in their capacity as such, was provided for by Article 257 of the Treaty of Versailles; but already before that Treaty was signed on June 28, 1919, a decision of the Supreme War Council, made and published by it early in May of that year, had designated the various Mandatories, and amongst them the Union of South Africa in respect of South West Africa; in point of fact the Respondent accepted the Mandate the same month. This decision of the Supreme War Council was confirmed in August of the same year. But even before that, most of the mandated territories (including South West Africa) were being administered by the future mandatories on a basis of military occupation resulting from the operations of the War. This point was stressed by Lord Balfour in the Council of the League when he subsequently said "Remember that a Mandate is a self-imposed limitation by the conquerors [of rights]

[1] For this reason, and as having taken the cession from Germany, it may be that, in that capacity, though not (as will be seen) as parties to the Mandates, the Principal Powers retained, and may still retain on a dormant basis, a residual or reversionary interest in the actual territories concerned except where these have attained self government or independence.

which they obtained over conquered territories. It is imposed by the Allied and Associated Powers themselves in the interests of what they conceive [to be] the general welfare of mankind; and they have asked the League of Nations to assist them in seeing that this policy should be carried into effect[1]." While not necessarily subscribing to all the legal implications of this statement, it clearly tends to support the view that a strict rather than a liberal interpretation should be placed on the consent given by the Mandatory under Article 7.

3. The Treaty of Versailles (and with it the League Covenant which formed part of it) came into force on January 10, 1920, and it was therefore not until then that, by virtue of Article 257, the actual transfer of the mandated territories to the Mandatories, in their capacity as such, formally took effect. On the same date, the Mandates *System* came into being under Article 22 of the Covenant; but the actual Mandates did not appear until much later—in the case of South West Africa, not until December 17, 1920. It will thus be seen that, considerably before the formal creation of the Mandates System, and still more before the terms of the actual Mandates were settled, the various Mandatories were in fact administering the Mandated territories (in practice as Mandatories) on a *quasi* anticipatory basis.

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The situation above described goes far, we consider, to explaining why the eventual Mandates did not take the form of ordinary treaties. The League of Nations as an entity was clearly closely concerned, yet its treaty making capacity was at that time doubtful, and would certainly have been doubted. How then could the League be brought in, in a manner that would not involve any question of its treaty making capacity? It may in any case well have been considered that the sudden emergence of treaties, with signatures and ratifications and provisions for coming into force (and who precisely would sign, and upon what would coming into force have depended?) more than eighteen months after the Mandatories had *de facto* started to function as such, would be inappropriate, and might well give rise to legal difficulties.

There is nevertheless evidence in the record that it had originally been intended to create the Mandates by treaty, but this intention was abandoned for reasons which are obscure, though they can be guessed at. We do not however draw from this circumstance the conclusion apparently drawn by some, that the Mandate should

[1] League of Nations, *Official Journal*, 18th Session of the Council (1922), pp. 546-548.

nevertheless still be deemed to be what it may originally have been intended to be—a treaty. We draw the opposite conclusion, that in the final result it was *not* intended to be a treaty, or the original intention would have been proceeded with. No other conclusion can well be come to on any permissible process of interpretation.

As it is impossible for us within reasonable limits of space to go over all the documentation, we propose to concentrate on one or two salient matters. The first of these consists of a report by the Belgian representative on the Council of the League (M. Hymans) which was adopted unanimously by the Council on August 5, 1920. This report contained a detailed consideration of the problems associated with the creation of the Mandates System, with a view to securing the performance of Article 22 of the Covenant, and it is of special importance. It stated *(inter alia)* that Article 22 laid down two essential principles which applied to all peoples not able to stand by themselves, namely:

(1) it was the sacred trust of civilization to assure the well-being and development of these peoples;

(2) certain guarantees were stipulated to ensure the performance of this trust, namely:

(a) the tutelage of such peoples was to be entrusted to the nations best fitted to undertake this responsibility;

(b) such nations were to exercise this tutelage as Mandatories and on behalf of the League.

Pausing there, it will be noted that amongst these guarantees and securities (as specified in this Report), there is no mention of any "judicial supervision" to be exercised by the Permanent Court relative to the conduct of the Mandate. We therefore have the position that in a Report which specifically stated what (in the unanimous view of the Council, since it was adopted unanimously) were the securities intended by the Covenant for the performance of the trust, there was no suggestion of any kind that any additional security was required or contemplated. In particular, for our purposes, there was no reference in the Report to any necessity for judicial determination of disputes relating to the conduct of the Mandate.

The same Report confirmed that the Principal Allied and Associated Powers had already, by a decision published in May 1919, decided who were to be the Mandatory Powers, and that the territories concerned were actually already being administered by the Mandatory Powers to whom it was intended to entrust them.

The Report went on to say that draft treaties had been negotiated between the Allied Powers principally concerned, but that the drafts had not been published. (These drafts are to be found in

Foreign Relations of the United States—Paris Peace Conference, Vol. IX at 649 *et seq*. They were in the form of formal conventions between the Principal Allied and Associated Powers and the Mandatory Powers.)

The Report then stated that the right to allocate the Mandates, i.e. to appoint the Mandatory Powers, and to determine the territories over which they would exercise authority, belonged to the Principal Allied and Associated Powers and that this admitted of no divergence of opinion. As to the degree of authority, control or administration, the Report suggested that the Principal Allied and Associated Powers should "at the same time as they acquaint us with their decisions as to the Mandatory Powers, inform us of their proposals with regard to the terms of the Mandate to be exercised". We stress the word "proposals".

The Report then suggested to the Council the following resolutions:

> "I. The Council decides to request the Principal Powers to
>
> *(a)* name the Powers to whom they have decided to allocate the Mandates provided for in Article 22;
>
> *(b)* to inform it as to the frontiers of the territories to come under these Mandates;
>
> *(c)* to communicate to it the terms and conditions of the Mandates that they *propose* should be adopted by the Council from *(sic)* following the prescriptions of Article 22 (italics ours).
>
> II. The Council will 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 prescription of Article 22 of the Covenant.
>
> III. 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."

This Report was adopted by the Council unanimously on August 5, 1920, and the suggested resolutions were duly carried.

It was not, however, until December 14, 1920, that a proposed draft "C" Mandates were placed before the Council of the League. The United Kingdom representative on that day "handed in a draft Mandate *proposed* by the British Government" relating to South West Africa and other "C" Mandate territories. The Council referred the drafts to the Secretariat "to consider the Mandate and to consult other legal experts on any points necessary"[1]. Subject to certain alterations made by the Council of the League—to which reference is made later—these drafts formed the basis of the Resolution of the Council of the League of December 17, 1920, containing the Mandate for South West Africa.

[1] *League of Nations Official Journal*, 2nd Year, No. 1, p. 11.

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The foregoing statement of the facts, in our view makes two things abundantly clear:

1. Any intention which the Principal Allied and Associated Powers may at one time have had to confer the Mandates, name the Mandatory Powers, define the limits of the Mandated territories, and set out the terms of the Mandates in a formal treaty or convention between themselves and the Mandatories, was abandoned in favour of the procedure set out in the resolution of the Council of the League of August 5, 1920, namely, action taken by the Council of the League directly pursuant to Article 22 of the Covenant.

2. At a certain point, i.e. when it adopted the Resolution of August 5, 1920, and thereafter, the League Council so to speak "took charge" of the whole operation, and what it required of the Powers was that these should communicate to it their proposed terms for the Mandates, in order that the Council might satisfy itself that they conformed to Article 22 of the Covenant, and the Council would then, *by its own act*, give these terms *the force of law*. In short the Mandates were not to take the form of treaties or conventions between the Principal Powers and the Mandatories: they were to take the form of a *quasi*-legislative act of the Council. As will be seen, this is the form they did take, and this constitutes the decisive factor regarding this part of the case.

* * *

(d) *The promulgation of the Mandate*

The Mandate for South West Africa, as eventually adopted by the Council of the League and promulgated by a Council resolution of December 17, 1920, had undergone certain alterations as a result of being referred to the Secretariat and to "other legal experts" at the stage when it consisted of a draft containing the proposals of the Principal Powers. These alterations, to which we shall come presently, were accepted by the Council for the purposes of its final resolution. They do not affect the substance of the Mandate, but they do affect in certain highly significant respects the jurisdictional questions under consideration in the present phase of this case. Their chief significance, however, lies in the fact that they were made at all, and by the Council acting as such, and as its own act—so that the Mandate, in its final form, was the act of an organ of an international organization, in the active exercise of powers conferred on it by its constitution. It was not a treaty or convention between States or other international entities and had not character as such.

We now set out the terms of the Mandate as adopted by the League Council on December 17, 1920, since it is not in our view possible to understand its character without the convenience of easy reference to it. It read:—

"MANDATE FOR GERMAN SOUTH WEST AFRICA

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22 Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas 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; and

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:

Confirming the said Mandate, defines its terms as follows:—

ARTICLE 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

ARTICLE 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

ARTICLE 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

ARTICLE 4

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

ARTICLE 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

ARTICLE 6

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

ARTICLE 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

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.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920."

The differences between the Mandate as adopted on December 17, 1920, and as it had been proposed to the Council on December 14, were as follows:—

(1) The draft as proposed on December 14, 1920, did not contain the fourth recital of the preamble in the final text, namely:

> "Whereas, by the above-mentioned 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[1]."

This recital was added by the Council, and it brings out what might otherwise not have been quite clear, namely that the text had *not* been previously agreed by the Members of the League, and was therefore, as it had in the circumstances to be, the act of the Council under Article 22 (8) of the Covenant. This point, as will be seen, is material to the question whether the Members of the League were ever individually parties to the Mandate if it was a treaty or convention.

(2) The original December 14 draft read as follows immediately after the preambular recitals: [The Council of the League of Nations....]

"Hereby approves the terms of the Mandate as follows:—"

For this the Council substituted: [The Council..., etc.]

"Confirming the said Mandate, defines its terms as follows..."

Clearly the effect of this was to substitute for what might have been contended to be a mere approval of pre-existing terms, something new, namely the definition of the terms of the Mandate by the act of the Council itself[2].

[1] It has been asserted that the Council's authority under Article 22 (8) was limited to authority over *territory* only. We regard this as an untenable assertion. It is meaningless to speak of administration over bare territory. To give this, in our view, wholly artificial meaning to Article 22 (8) is to disregard the rest of that Article and the purposes it was designed to serve. The Council was in our view perfectly competent to subject the Mandatory's administration of the territory and its peoples placed under tutelage to such conditions and limitations as it thought fit in order to carry out the purposes of Article 22, provided they were in conformity with and not inconsistent with the terms of Article 22. In any case, and this is the important consideration, the Council and all its Members, including of course the Principal Powers, believed it was acting within the scope of its authority in defining the terms of each Mandate instrument. The conduct of all States, Members of the Council, then and since is wholly inconsistent with any other view.

[2] What the Council confirmed was the conferring of a Mandate upon the Mandatory. That had to be the act of the Principal Allied and Associated Powers consequent upon Article 119 of the Treaty of Versailles.

(3) The first paragraph of Article 7 of the Mandate as it appeared in the December 14 draft had provided that the consent of the Council for any modification of the terms of the Mandate instrument might be given by a majority. This reference to a majority was struck out by the Council. The significance of this, as indicative of the status of the Council in relation to the Mandate will be considered hereafter.

(4) The second paragraph of Article 7—the critical paragraph from the point of view of these proceedings—as originally drafted provided:

> "If any dispute whatever should arise between the Members of the League of Nations ... this dispute shall be submitted...", etc.

This was altered by the Council to read:

> "The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another Member of the League...", etc.

We shall state later what were the reasons for this alteration, and shall only mention here that they make it virtually impossible to hold the view that if (contrary to what we think) the Mandate was a treaty or convention, the various Members of the League were individually parties to it as such.

* * *

(e) *The character of the Mandate as promulgated*

On the face of it, the Mandate as set out in the League Council's resolution of December 17, 1920, does not look like a treaty, convention or other form of international agreement. In form and on the face of it, it looks like what it purported to be—a Declaration promulgated by a resolution of the Council of the League in the exercise of a power conferred upon it by paragraph 8 of Article 22 of the Covenant, exercisable precisely if the terms of the Mandate had *not* been "previously agreed upon by the Members of the League". To all appearances therefore, the Mandate was a quasi-legislative act of the League Council, carried out in the exercise of a power given to it by the Covenant to meet a stated contingency—a power which it was bound to exercise if the terms of the Mandate had not previously been agreed upon by the Members of the League. This being so, the Court must accordingly be conclusively satisfied that the Mandate has a different character—that it is in fact an international agreement, and has treaty character.

We might add, what it should scarcely be necessary to say, that the fact that an act is done under an authority contained in an instrument which is itself a treaty (in this case the League Covenant) does not *per se* give the resulting act a treaty character. To take a familiar recent instance—under Article 17 of the United Nations Charter the General Assembly is authorized to approve the budget of the Organization, and the budget as approved is binding on the Member States. It could not be contended that it is on this account a "treaty" any more than could a resolution of the General Assembly apportioning the expenses of the United Nations amongst its Members under Article 17 (2) of the Charter.

All the arguments that have been advanced for the purpose of establishing the treaty character of the Mandate seem to repose on one or both of two assumptions. The first, which we have already discussed, is that any instrument creating international obligations has treaty character. In refutation of this view, we need only refer to what we have already said under the head of "Legal nature of a treaty or convention".

The second assumption is that if an act or instrument follows upon certain antecedent consents, this entails that it is itself an agreement. This is not the case. We have already cited cases such as those under Article 17 of the Charter; and we could cite numerous examples drawn from private law, of acts which can follow upon various consents and agreements, but which are themselves of quite a different character. Even legislative acts can follow upon certain consents, and there may even be, and often is, a constitutional requirement that these should have been obtained. Yet when a Head of State issues a Decree or Order, and the latter recites (as it often does) that it is made "by and with the consent" of his Council, or of some other body, this does not impart even a vestige of a contractual character to the resultant act.

Consequently, neither the fact that the Mandate created international obligations, nor the fact that it recites in its Preamble the existence of certain antecedent consents, is conclusive, or carries the matter much further. Of course, there had to be an antecedent agreement between the Principal Powers to confer a Mandate on a particular Power: and there had to be a common understanding—call it agreement—between them as to the draft terms of the Mandate wich they would propose to the Council. Clearly the Mandate would never have been promulgated except against a background of some general common understanding. But this does not suffice to give it a treaty character. The test, as we have said earlier, must be, not whether certain background consents or understandings or agreements existed, nor whether international obligations were created, *but what was the character of the act or instrument that gave those obligations their legal force.* This act was

in our view the resolution of the Council. From the moment of its issue on December 17, 1920, the Mandate had the force of law. Previous to that, whatever agreements existed, it had not.

The facts we have adduced make it clear that the resolution of the Council cannot be regarded as an instrument simply registering and recording the terms of an international agreement, from which agreement the rights and obligations concerned really sprang. In the first place, this resolution, as has been seen, specifically recited (in the fourth recital which the Council itself introduced) that the terms had not been agreed by entities which had, or might be thought to have, an interest in the matter. Secondly, the Record makes it clear that, as has been seen, the Council did not simply take over and re-issue automatically the terms proposed to it by the Principal Allied and Associated Powers, in mere approval of an antecedent and independent agreement, acting in effect as a "rubber stamp". As has been noted, the idea of embodying the Mandates in ordinary treaties or conventions had been abandoned; and the Council, in certain significant respects already indicated, altered the terms as proposed by the Principal Powers, and issued these revised terms expressly as the Council's own act, in definition of the terms of the Mandate. The mere fact that the Principal Powers agreed amongst themselves as to what terms they would "propose" to the Council, cannot possibly give the Mandate instrument itself treaty character. Nor can the fact that these Powers had in 1919 agreed on the States to whom a Mandate was to be conferred.

In these circumstances, and having regard to the form of the Mandate instrument and to the fourth recital in the Preamble, it is not reasonably possible to consider that the onus which lies on the Applicant States to establish that the Mandate had a treaty character, has been discharged.

It has however been suggested that the Mandate is not all contained in the relevant Council resolution, and that it is also partly contained in Article 22 of the Covenant, which does have a treaty character. We have already shown that what Article 22 was concerned with was the *system*. In only provided for one specific obligation to be imposed on Mandatories, namely to render reports to the Council. But the obligation itself, so far as the Respondent State was concerned, was imposed by Article 6 of the Mandate for South West Africa, thus making it a self-contained instrument. The relevant Council resolution was entitled, and has always been known, as the "Mandate for German South West Africa"; and when, in the international field, the Mandate for South West Africa is referred to or cited, it is to this resolution that reference is made. That this was considered to be "the Mandate" is apparent from the references

contained in the resolution (e.g. in Article 2 and 7) to "the present Mandate" [1]

* * *

Certain subsidiary indications as to the character of the Mandate may now be noticed. There is, to begin with, the fact that under the first paragraph of Article 7, the terms of the Mandate could only be modified with the consent of the League Council. This naturally was inserted in order to prevent any attempt at modification, either unilaterally, or by agreement between the Mandatory and some other entity or entities. It will be recalled that initially, consent by a majority of the Council was proposed. But this was altered by the Council so as to require consent by the whole Council. We attach no importance to the fact that—since the Council acted by unanimity—this alteration gave a veto to the Principal Powers as standing Members of the Council. The effect of the alteration made by the Council was to give *each* Member a veto. What the alteration introduced by the Council makes evident is that the Mandate was regarded as being basically, as well as formally, the act of the Council as such, whose consent as an entity was therefore necessary for any modification of it. This provision is certainly not consistent with the view that the role of the Council in bringing the Mandate into being was that of a mere agent or promoter *(entrepreneur)*, utilized as a matter of convenience in order to give effect in concrete terms to the arrangements of others, and which thereafter drops out of the picture. Nor is the supervisory role of the Council under Article 6 of the Mandate consistent with such a view.

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Finally, there is the fact that the Mandate, in common with all the other "B" and "C" Mandates, was not registered as a "treaty or international engagement" under Article 18 of the Covenant—precursor of Article 103 of the United Nations Charter [2]. The provision in the final paragraph of the Mandate, for its deposit in the Archives of the League, did not amount to a registration of it as a treaty for the purposes of Article 18. This was merely the common form provision, which appears in almost every international instrument, for depositing the original text either with the headquarters gov-

[1] Moreover, even if the Mandate could be said to have been partly contained in Article 22 of the Covenant, the Covenant is no longer in force as a treaty or convention and, in any case, the adjudication clause to which Article 37 of the Court's Statute must attach itself if it is to apply at all, is in the Mandate (Article 7), not the Covenant.

[2] This has been confirmed by official enquiry at Geneva.

ernment or, as the case may be, with the international organization in or under the auspices of which it has been drawn up. Indeed a glance at the terms of the System of Registration approved by the Council in May 1920 is sufficient to establish that the provision for deposit in the League's archives could not amount to registration under Article 18. This is further confirmed by the fact that none of the Mandates—with the exception only of Iraq, which for special reasons was in the form of a treaty—ever appeared in the Treaty Series published by the League.

It is of course possible for an instrument in fact to be a treaty or other international agreement despite non-registration, and therefore the non-registration of the Mandate was not of itself conclusive as to the latter's character. But what the fact of non-registration does conclusively establish is how it was *regarded* by those concerned, i.e. that they did not regard it as a treaty, convention or other form of international agreement.

It is reasonably certain that if those concerned had definitely regarded the Mandate as a treaty or convention, they would have registered it under Article 18, as the United Kingdom later registered the Mandate for Iraq. Certainly the need for registration, if anyone connected with the events of 1920 ever thought the Mandate instrument was a treaty or convention, could hardly have escaped the notice of the Secretary-General. That the Mandate instrument was not registered may not establish conclusively that it was not an international agreement, but since it must be assumed that the Members of the League did normally register anything they thought had that character, non-registration is good evidence that, in the case of the Mandate, neither the Council nor any Member of the League (or any of the Principal Powers) thought it was[1].

A final factor militating against the view that the Mandate had treaty character is the difficulty of satisfactorily identifying the parties to it, considered as a treaty or convention. This matter we shall consider in the next section.

* * *

3. *Is the Mandate "in force" as a treaty or convention?*

(a) *At what date must it be in force as such?*

Since, in our view, the Mandate has not, and never did have the intrinsic character of an international agreement, it is strictly

[1] We are aware of course that in the case of *Mavrommatis* (P.C.I.J., Series A/B, No. 2, at 11) the parties did not dispute that the Palestine Mandate was a treaty or convention in force. The issue was not contested, objections to jurisdiction were based on other grounds.

unnecessary to consider whether it is still in force, regarded as a "treaty or convention". Nevertheless we propose to do so, because the Mandate, if not itself an international agreement, had certain aspects on the basis of which it may be argued that it had some conventional character. This being so, we would not wish to rest our view on the sole conclusion that it had not—correct though we believe this conclusion to be.

Furthermore we think it essential to consider whether the Mandate is still "in force" as a treaty or convention, assuming it was one, for the following reason. The fact that the issue raised by the first Preliminary Objection is not whether the Mandate is simply "in force", appears to have been completely lost sight of. The issue arising on Article 37 of the Statute is whether the Mandate is in force *as a treaty or convention*. For this purpose it is not sufficient to rely on the Court's 1950 Opinion as establishing that the Mandate is, in any case, in force on an *institutional* basis.

The term "in force" in Article 37 must, we think, be taken to have the same meaning as in the reference to "treaties and conventions in force" in Article 36, paragraph 1, of the Statute, namely in force at the date when the Court is seized of the case by Application, this being the date when all the elements necessary to give the Court jurisdiction must be present[1].

(b) *Who would be the parties to the Mandate as a treaty or convention in force?*

It is, or should be, common ground that, assuming the Mandate to have been a treaty or convention, there must have been parties to it, and that it would have ceased to be in force as such on the disappearance of the parties, and/or the reduction of them to below the minimum number (of two) requisite for an agreement to be, and remain, in force as such. We do not accept the view that a treaty can be "partyless". The present-day United Nations trusteeships have been cited. Whether these are true agreements

[1] The suggestion is advanced that assuming the Mandate was a treaty or convention in force prior to the dissolution of the League, Article 37 of the Court's Statute would have permitted a State, a Member both of the League and the United Nations, to invoke the jurisdiction of this Court up to the time that the League was dissolved; that once the Mandate came within the scope of Article 37 it remained under it, and that accordingly it must be concluded that such States continued thereafter and until today to enjoy the right to invoke Article 7 of the Mandate.

The premises manifestly do not support the conclusion.

Article 37 of the Statute did not *keep* in force treaties or conventions in force when the Statute came into operation. It goes without saying that if at the time when the jurisdiction of the Court is invoked a treaty or convention has come to an end, as such, whether by effluxion of time, agreement between the parties, or for any other reason, such treaty or convention cannot provide the ground upon which jurisdiction can be based.

(see Articles 81 to 83 and 85 of the Charter) is not a question we are called upon to or should express an opinion upon; this would involve an interpretation of the relevant provisions of Chapter XII of the Charter. But if they are agreements they certainly have parties. In 1920, however, and under international law as it then stood, there was no such thing as an international agreement the parties to which could not readily be identified.

We must therefore consider the question of who were (apart from the Mandatory itself), and who are now, the parties to the Mandate considered as a treaty or convention: but we do not propose to examine obviously untenable propositions such as that the inhabitants of the mandated territory were directly or indirectly parties. There remain for consideration the Principal Allied and Associated Powers, the individual Members of the League of Nations, and finally the League itself or League Council.

(i) *The Principal Allied and Associated Powers*—It has been suggested that the Principal Allied and Associated Powers were the parties, together with the Mandatory. If such was the case, these Powers appear to have been totally unaware of it for upwards of forty years. It has already been seen that the original idea of casting the Mandate into the form of an ordinary treaty or convention was abandoned, and in our view no contractual nexus was established or intended to be established with or between the Principal Allied and Associated Powers on the basis, or in consequence, of the Mandate instrument. This is evidenced not only from the facts antecedent to December 17, 1920, but also from the text of the Preamble itself, which makes it clear that the role of the Powers was confined to naming the Mandatory, and to proposing the terms of the Mandate for the acceptance or rejection of the Council—terms which the Council in fact modified before issuing them as its own act. Once the Powers had taken this action they became *functus officio*, apart from such residual or reversionary rights in the mandated territory itself as they may have retained on a dormant basis. Thenceforward, the action was the League Council's, and if it resulted in a treaty or convention at all, it was not one to which the Powers as such and as a group were parties; for thenceforward (as provided by the Covenant) the Mandatory exercised the Mandate "on behalf of the League", and the Powers disappeared from the scene except as Members of the Council.

The absence of any contractual nexus so far as the Powers were concerned, is further evidenced by the fact that, although the United States of America had participated in the earlier drafting of the "C" Mandates, and in the allocation of the Mandate for South West Africa to the Respondent State in 1919, it not only was not present at the Council Meeting of December 17, 1920—since it had

never ratified the Treaty of Versailles or become a Member of the League—but was unaware of what had been submitted to the Council on December 14, 1920, and dealt with by the latter three days later[1]; or of what action the Council had taken, until after the event. Moreover we know that in the separate treaty which the United States concluded with Germany in Berlin in 1921, it reserved for itself all rights and advantages set out in the Treaty of Versailles for the Principal Allied and Associated Powers, including those in respect of the former German colonies, and stipulated that it should not be bound by any action taken by the League of Nations unless the United States should expressly give its assent to such action. Whether the United States ever did expressly give its consent to the terms of the Mandate for South West Africa does not appear.

*

The view that the Powers were or regarded themselves as being parties to the Mandate (or to any of the Mandates) is equally impossible to reconcile with their subsequent conduct, as also with certain elements of the legal situation resulting from the Mandate instrument.

At no time subsequent to December 1920, did any of the Powers claim to be a separate party, *qua* Principal Allied Powers, or to have any interest in the conduct of the Mandate otherwise than through their membership of the League Council. Such a claim would also have been hardly consistent, legally, with the fact that according to paragraph 1 of Article 7 of the Mandate, it could only be modified with the consent of the League Council (a similar provision appeared in all the "B" and "C" Mandates).

This situation was no doubt masked by the fact that the Principal Powers (minus the United States however) were themselves permanent members of the League Council which acted by unanimity. Moreover, it is possible, though not easy, to read paragraph 1 of Article 7 of the Mandate as not excluding the necessity for other consents, additionally to the Council's. Again, it can be contended that countries may become parties to treaties which they have agreed shall be subject to modification without their consent, and that this was in fact the position of the Powers in relation to the Mandate, because of or under paragraph 1 of Article 7.

These are far-fetched arguments, or hypotheses (speculations really), and the point is that there is no evidence at all to show that this was the position, rather than the much more natural and likely hypothesis that if the Mandate was a treaty, the other

[1] This appears from Annexes 154, 154 *a*, *b* and *c*, to *Procès-Verbaux* of Meeting of 12th Session of the Council of the League of Nations.

party to it was the League alone, or the League Council acting for it. It is quite clear that the Council's view was that it alone was the competent authority to modify the terms of a Mandate instrument, a view which it is evident the Principal Allied and Associated Powers on the Council accepted. The Council on many occasions acted on this view. It seems indisputable that the Principal Allied and Associated Powers on the Council accepted the position that, except in their capacity as Members of the League Council, their functions had been completed once the Mandates had been established. There is no evidence to suggest that any of them ever thought that their consent was essential to any modification of a Mandate, or that this was merely because they had waived their rights in the matter[1].

But whatever may have been the position in the time of the League of Nations, the view that the Powers were (and still are now) parties to the Mandate as a treaty or convention, would lead to even more formidable difficulties to-day, particularly if the Court's 1950 finding that the Mandate could be altered by agreement between the Mandatory and the United Nations was correct--for in the Assembly of the United Nations the Principal Powers have no controlling vote or veto, and only three of them are—if the United States is included—Permanent Members of the Security Council. One can only conclude that in the absence of express provisions producing such a result, it is not legally possible to entertain the idea that a group of countries can be parties to a treaty which can be altered without their consent, or even, it would seem, contrary to their wishes.

Nor is the post-1945 conduct of the Powers consistent, any more than it ever was, with the view that they, or any of them, were parties to the various Mandates as treaties or conventions.

[1] What took place in relation to the Mandate of Iraq is we think informative.

The Mandate was conferred upon the United Kingdom by the Supreme Allied Council at San Remo on April 25, 1920. The United Kingdom accepted the Mandate.

Thereafter the United Kingdom entered into a series of Treaties between itself and the King of Iraq. These or most of them were communicated to the Council of the League. No other State was a party to these Treaties.

In a communication from the United Kingdom of September 27, 1924, to the Council of the League—and to it alone—these Treaties were summarized and supplemented by a statement setting out the Mandatory Powers own obligations to the League, with regard to the application of Article 22 of the Covenant. In this communication the United Kingdom stated that it was "willing to agree" with the *Council* upon certain terms which were set out.

Amongst the undertakings given to the Council and accepted by it was one that an annual report should be made to the satisfaction of the Council, another to the effect that no modification of the terms of the Treaties would be agreed to without the consent of the Council, and an adjudication clause which in general follows the form of Article 7, paragraph 2, of the Mandate for South West Africa. The Principal Allied and Associated Powers were as such complete strangers to these undertakings; which were given to the Council and to it alone.

On that basis what would one make, for instance, of the passage in the resolution of the League of April 18, 1946, which referred to the Mandatories' intentions to continue to discharge their obligations under the Mandates "until other arrangements have been agreed to between the United Nations *and the respective Mandatory Powers*" (italics ours)?

Again, when various of the mandated territories were brought under the Trusteeship System of the United Nations, this was done directly by the Mandatory Power concerned, and at no time did any of the Principal Allied and Associated Powers claim, as such, any right to be a State "directly concerned" with the terms of trusteeship under Article 79 of the Charter of the United Nations.

The conclusion must be that the notion of the Principal Powers or any of them being or ever having been parties to the Mandate, *qua* treaty or convention, is too artificial and gratuitous to be accepted. It represents little more than a rather desperate attempt to produce some entity as a party which is still extant, and can therefore, together with the Mandatory, be pointed to as keeping the Mandate in force today as a treaty or convention[1]. Much the same applies to the next suggested category of parties, to which we now address ourselves.

(ii) *The individual Members of the League*—If the Members of the League were parties to the Mandate in their capacity as such, there would be no problem, for the League being dissolved, its former Members have lost that capacity and could no longer be parties to the Mandate as Members of the League. The question is therefore, and must be, if they were parties, were they so in their individual capacity as separate sovereign States, still extant (as States) today?

We think this question can only be answered in the negative. An instrument or "Declaration" (which was the name given to

[1] A variation of this theme is the view that four only of the Principal Allied and Associated Powers were parties to the Mandate as a treaty or convention. This variation omits the United States. This contention is, if anything, more artificial than the major theme of which it is a variation. Its only merit is that it seeks to overcome the difficulty created by the fact that the United States, not being a Member of the League, was not present at the meeting of the Council in December 1920. Otherwise the same criticisms apply to it. The United States had of course participated in the conferring of the Mandate and in drafting the terms proposed to the Council.

The contention in any case is quite inconsistent with the recitals to the Council's resolution of December 17, 1920, recitals 1 and 2. The Principal Allied and Associated Powers by definition under the Peace Treaty included the United States. The United States was distinctly included in the constantly used descriptive phrase "the Principal Allied and Associated Powers": see Annex 154 *b*, Minutes of 12th Session of Council of the League.

the Council's Resolution of December 17, 1920, embodying the Mandate) issued by and in the name of the Council as its own act, could not bring in the Members of the League except in their capacity as such—a capacity they no longer have. For them to have become, and still to be, parties to the Mandates, in their individual statal capacity, *independently of their membership of the League*, would have required something in the nature of the ordinary processes of separate signatures, ratifications, full powers, etc. The whole form and method of issue of the Mandate is hostile to the notion of the individual Members as separate parties to it, or as having any status in regard to it, other than as Members of the League and through their participation in its activities.

But in any case, the notion of the Members as separately and individually parties, is excluded by the express statement in the Preamble to the Mandate (fourth recital) that the Members of the League, not having previously agreed upon the terms of the Mandate, these were now being defined by the Council in the exercise of the power given it to do so in such circumstances by Article 22, paragraph 8, of the Covenant. Forty or fifty countries cannot be separate parties to an agreement which specifically recites that they have not agreed upon its terms. It has been suggested that the term "Members of the League" in this fourth recital had some special, limited and restricted meaning, not including the generality of the Members, and confined, for instance, to the Principal Powers. If this were correct, then, since it must be assumed that the term "Member" or "Members" of the League had the same meaning wherever used in the Mandate, it would follow that the term "any ... Member of the League" as used in Article 7, paragraph 2, had the same alleged special, limited and restricted meaning as in the Preamble, and did not therefore include the Applicant States now claiming under paragraph 2 of Article 7.

But clearly this suggestion is not correct. It was not merely a question of the Principal Powers giving up the notion of negotiating the Mandate by treaty or convention. The other Members of the League were extant, but they were hardly even consulted or asked to agree. From the Summary Record of a meeting of the Sub-Committee VI *(c)* of the League Assembly, the Committee on whose business agenda the question of Mandates was placed—a meeting held as late as December 13, 1920—it appears that the Council of the League were already considering the draft of "A" Mandates, and would probably be considering shortly the "B" and "C" drafts also, yet the Assembly was being kept in the dark on what was happening. Copies only of the draft "A" Mandates had been furnished by the Council to the Sub-Committee, but on the strict understanding that this information was confidential and that it

must not be used. Four days later the Council promulgated the Mandate for South West Africa.

It is therefore, we think, evident enough that the Council did not purport to enter into any contractual engagement on behalf of the individual States which, either at that time were, or at any time thereafter should become, Members of the League. The Applicants admitted, and we think correctly admitted, that the Council acted under the provisions of Article 22 (8) of the Covenant, and not otherwise. The Council was doing what, in the circumstances, it was under a duty to do under that Article. It was not we think purporting to enter into any treaty obligation at all, and it certainly was not purporting to enter into one on behalf of the individual States, Members of the League.

Indeed, one will look in vain for any authority in the Covenant by virtue of which the Council could enter into treaty arrangements so as to make individual States, who were Members of the League, then or at any subsequent time, parties to a treaty or convention. The facts equally fail to disclose any authority given by States to the Council to act for each of them and to enter into a treaty or convention on their behalf; and it is established that, apart from those Members of the League, who were also Members of the Council, all other States were ignorant beforehand of what was contained in the Mandate.

Action taken by the Council under Article 22 (8) bound the League and its Members not because any treaty or convention came into existence, but solely because the League as such, and the States Members of the League, were bound in advance under the Covenant by whatever definition of the degree of authority, control or administration to be exercised by the Mandatory Power, was made by the Council acting under Article 22 (8). They were *bound* by the Mandate, in so far as that is relevant; but as, and through, being Members of the League, not as actual parties to the Mandate itself. A further indication to the same effect, is that in such provisions as Articles 5 and 7, the Mandate refers—not to the "Parties to the present Mandate", or to the "Parties to the present Declaration", but to the "Members of the League". It was as Members of the League, and not as parties to the Mandate, that certain rights were conferred on them. Indeed, one of the most striking refutations of the view that the Members of the League were ever regarded as parties to the Mandate is to be found in the fact, noted earlier, that the League Council, when it received the draft terms proposed by the Powers, made an important change in paragraph 2 of Article 7. It changed this provision in such a way that instead of all the Members of the League undertaking the obligation of compulsory adjudication of disputes, the Mandatory alone undertook it. This appears to have been done because it was felt—and rightly felt— that an obligation of this kind could only result from specific consent. But had the

Members of the League been *parties* to the Mandate, they *would* thereby have consented. Clearly they were not considered to be parties.

Nor could it be contended that, because the Mandate conferred on the Union of South Africa was to be exercised by it "on behalf of the League", this made each State which was a Member of the League, into a separate party to the Mandate instrument as a treaty or convention.

We conclude that any interest in the Mandate which the Members of the League possessed, or any part in it as an international act which they may have had, was solely in their capacity as Members of the League.

* * *

(iii) *The League or League Council as party*—From the foregoing, the inevitable conclusion must be drawn that, all other candidates having been eliminated, the only party to the Mandate, apart from the Mandatory (and if the Mandate was a treaty or convention at all), was the League itself or the Council acting for it. This is the only conclusion consistent with the salient facts—namely that the Mandate was the act of the Council; that the Council defined its terms; that the Mandate was exercised "on behalf of the League"; that except for certain specific rights given by particular provisions of the Mandate to the "Members of the League" (in their capacity as such, that is), all the obligations of the Mandate were owed to the League; and that the Mandate could only be modified with the consent of the whole Council.

The only doubt, to which we alluded earlier, is whether, at that date, an international organization such as the League, and still more a particular organ of it, such as the League Council, would have been regarded as having separate international personality and treaty-making capacity. This doubt may well have been one of the considerations which suggested the actual form taken by the Mandate. But if so, this would merely bear out the conclusion we came to on the first part of the first preliminary objection, namely that the Mandate never had treaty character at all—for if all the entities that might possibly have been parties to it, considered as a treaty or convention, apart from the Mandatory, have to be eliminated (including the League and its Council), the inescapable conclusion is that the Mandate was not (as it certainly was not in form) an international agreement.

As we suggested earlier, doubts about the treaty-making capacity of the League and its Council, coupled with the obvious need for providing the Council with an unimpeachable standing in the matter, and the requirements of Article 22 (8) of the Covenant, may well have been, indeed we believe it was, a factor in the decision to formulate the Mandate as a Resolution of the Council, rather than as a treaty or convention between the Principal Allied and Associated Powers and the Mandatory.

In no other way could the Council be given its proper place. Under a treaty or convention, even if it had made provision for the position of the League and its Council, this position might well have been impossible to assert, in the last resort, except through and with the co-operation of the Powers, and of the Mandatory. Such a situation would have been wholly incompatible with Article 22 of the Covenant, and with the whole concept of the Mandates System.

These can only be speculations. What is quite clear is that if the Mandate was a treaty or convention, the parties, and only parties to it, were the Mandatory and the League or its Council. Since neither League nor Council exist now, the number of parties is less than two, and therefore, *as a treaty or convention,* the Mandate is no longer in force.

There is, further, the fact of the non-registration of the Mandate as a treaty or convention under Article 18 of the Covenant. As previously noticed, this is a strong indication that those concerned did not regard it as having treaty character. But if it *was* a treaty or convention, as the Applicants contend, then its non-registration as such would raise the question, under Article 18, whether it was "binding" in *its character as a treaty or convention.* If it were not, the further question would arise whether a treaty or convention which is "not binding" is, or can be, "in force"[1].

* * *

Conclusion on the first preliminary objection: the conditions requisite to give the Court jurisdiction under Articles 36 and 37 of its Statute are not fulfilled, inasmuch as the Mandate was the act of the League Council and is not and never was a "treaty or convention" (or other form of international agreement); or alternatively, if it was, it is no longer in force as such, as there would now remain only one party—the Mandatory.

[1] Even if, as has been suggested, this should not be taken to mean more than is provided for by Article 102, paragraph 2, of the United Nations Charter—namely that an unregistered instrument cannot be *invoked* "before any organs of the United Nations"—the Court is such an organ (see Article 7, paragraph 1, of the Charter).

V

SECOND PRELIMINARY OBJECTION

In the normal course it would be sufficient to rest upon the answer we gave to the first objection. Since however we believe that each of the objections raised by the Respondent stands in the way of the Court assuming jurisdiction, we deem it our duty, in the special circumstances of the case, to express our views on each objection.

There are also special reasons why we should deal with the Second Objection.

Although we are satisfied that the Mandate is not a treaty or convention, in force as such, we recognize, as we have already indicated, that the Mandate had a certain background of consent, as indeed it had to have. We cannot, in recognizing this, do so for the reasons, or with the consequences, adduced in support of the Applicants' contentions. A view which, in the face of most of the evidence, asserts that the Mandate was a treaty, and then seeks to discount the resulting difficulties on the ground that this treaty was *sui generis* or was not an ordinary agreement, confesses it seems to us a lack of cogency. The same may be said of a view which holds the Mandate to be in force today as a treaty or convention, but which is unable to indicate who are now the parties to this treaty or convention, apart from the Mandatory; or which, on the same plea of it being a special case, argues that it is immaterial whether there are any parties or not; or which again, in disregard of legal principle, postulates for certain States a right they only had in a capacity they have lost.

But in any event, the Second Objection raises in a much more direct form than the First, an issue which must always be central to any question of the jurisdiction of the Court, namely the capacity of the Applicant States to invoke the clause alleged to confer jurisdiction on the Court.

* * *

1. *Importance and character of the Second Preliminary Objection*

Since adjudication clauses invariably indicate what are the entities, or classes of entity, entitled to avail themselves of the right to call for a reference to adjudication, the basic question arising on this part of the present case is whether the actual terms of Article 7 permit the Applicants to invoke it; and if not, on what legal basis (if any) they can nevertheless claim to do so. These terms, we would recall, so far as here relevant, are that the Mandatory agrees to submit to adjudication, disputes with "any other Member of the League of Nations".

It is clear that Article 37 of the Statute cannot operate so as to substitute the present Court for the former Permanent Court *in a case in which that Court could not have had jurisdiction.* It does not operate so as to increase jurisdiction. It merely substitutes for a reference to the Permanent Court a reference to this Court. It cannot, and does not, of itself determine whether, in the given case, that Court would in fact have been competent. We must stress this point because, evident though it should be, it does not seem to have been fully appreciated in the present case. A provision like Article 37, which is not specifically directed to the case of Mandates, and relates to a very large number of treaties and conventions of all sorts and kinds, is quite neutral as to whether in any given case an obligation to submit to adjudication does exist. *Whether* the obligation exists in any given case, or not, depends on the adjudication clause alleged to create it (in this case Article 7 of the Mandate)[1], which such a provision as Article 37 can neither add to nor alter. Failing any express provision to that effect, and there is none, Article 37 could only operate so as to confer on the present Court the *pre-existing* competence—whatever that was—of the Permanent Court, and not so as to confer a different or more extensive competence. Moreover Article 37 could not of itself determine whether any competence at all existed.

One may accept unreservedly that the present Court is, within the limits of Article 37, substituted to the fullest possible extent for the former Permanent Court, to exercise any jurisdiction which that Court could, in its day, have exercized. The question would still remain in any given case; could the Permanent Court itself have exercized that jurisdiction? In our view, it could not and would not have done so under Article 7 of the Mandate, except at the instance of a Member of the League of Nations—a quality not attaching to the present Applicants. It is, in our view, so evident both that the present International Court cannot exercise a jurisdiction which the former Permanent Court could not, in its day, have exercized, and that in fact the Permanent Court could not then have assumed jurisdiction in proceedings brought against the Mandatory by a non-Member of the League, that little more should be necessary to be said on this part of the case.

[1] It is the *scope* of the Mandatory's obligation to submit to adjudication which is governed by Article 7. An unlimited obligation to submit to adjudication is almost unheard of. Practically every adjudication clause contains conditions and limitations of some kind. A very frequent, almost invariable one, is a limitation as to the class of State or entity which can invoke the clause. In the case of treaties, the right is normally restricted to the parties to the treaty; and in the case of instruments not of a treaty character, framed by or under the auspices of an international organization, the normal limitation is to States Members of the organization concerned.

In the present proceedings what the Court has done—in our view without legal justification—is to consider the matter on the footing of what jurisdiction the Permanent Court could and would have exercized if it was still functioning *now*—that is to say on the assumption that the League of Nations was duly dissolved in 1946, but that the Permanent Court had survived and was here and now sitting and hearing the present case. This is of course to beg the whole question at issue, and to disregard the fact that Article 37 could do no more than operate so as to give the present Court jurisdiction in a case in which the Permanent Court would have had jurisdiction. This necessarily presupposes a case arising at a time when the Permanent Court was in existence, for a non-existent Court can obviously have no jurisdiction at all. If the Permanent Court was still functioning, there would have been no need to substitute the present Court for it. If the present Court has been substituted for the former Court, it is because the latter was and is not any longer functioning. Hence the jurisdiction which the present Court "inherits" (so to speak) from the former Court is the jurisdiction which the former Court *actually was empowered to exercise when it was functioning*—that is to say the jurisdiction which then fell within the scope of its competence. This did not include proceedings purported to be brought under Article 7 by non-Members of the League, under which category the Applicants fall.

In our view this is conclusive so far as the Second Preliminary Objection is concerned, and strictly incontrovertible. Nevertheless, we will consider the matter on the basis of whether the Permanent Court, if it had survived the dissolution of the League, and were here and now sitting, would be competent to hear and determine the Applications now before the Court.

* * *

What the Court is called upon to consider in this part of the case is the claim made on behalf of the Applicant States, that although they are no longer Members of the League, because the League itself has been dissolved, nevertheless as former Members, that is, as States who were Members at the date of its dissolution, they should be deemed to have retained, or still to possess, the right to invoke Article 7.

We propose to begin by considering whether the kind of transformation or metamorphosis involved by the Applicants' claim, as just stated, could possibly be admitted on the actual language of Article 7, or by any legitimate process of "interpretation" of it. We shall later consider whether such a transformation could be postulated on the basis of any process of presumption or implication derived from circumstances lying outside Article 7 itself, or

on the basis of the application of some general principle of law operating to effect such transformation.

* * *

2. *The interpretation of Article 7*

(a) *The actual language of the Article*

We shall assume as our starting point something which we shall demonstrate more fully later, namely that, in the absence of express provision to the contrary, rights conferred on or exercisable by a person or entity in a specified capacity, or as a member of a specified class, cannot be exercized in another capacity, or as a member of another class, or continue to be exercized if the specified capacity is lost or membership of the class ceases.

Thus, rights conferred on State A as a Member of the League, or simply on "Members of the League" (State A happening to be or become a Member) were not, and could not be rights conferred individually on State A as such, which State A could thenceforth retain *indefinetly*, without limitation of time, irrespective of its relationship to, or of the very existence of the League[1].

The fundamental issue of principle raised by the second preliminary objection is therefore: on what grounds, if any, can States invested with rights as, and only as, members of a class, claim those rights in their individual capacity (no longer being members of that class, or that class having ceased to exist), or as members of another and different class?

Lord McNair (as he now is) was the only Member of the Court in the 1950 case who specifically considered this issue in that form, and he, in effect, set aside the class basis of the right conferred by Article 7, holding that the mention of membership of the League constituted only a *description* of the States entitled to exercise the right, and was not a *condition* of its exercise. It did not mean "so long as the League exists and they are Members of it" (*I.C.J. Reports 1950*, at p. 159.) In short, his view, to paraphrase it a little, was that a State must, of necessity, no longer be a member of a now non-existing organization, but this did not matter so long as it could still be *identified* as a State that was invested with the right when the organization still existed.

[1] Even as a matter of ordinary logic, it is clear that rights conferred expressly on members of a class, as such, are not thereby conferred on them as individuals.

It is, naturally, with diffidence that we feel bound, for reasons which will appear, to differ from this distinguished Judge. Lord McNair's opinion was indeed an attempt, the only one which has ever been made, to reconcile such a claim as that of the present Applicants with the actual language of Article 7. But it appears to us to have overlooked the fact that Article 7 was never intended to apply to any particular States as *States*. Nobody knew in 1920 what the exact membership of the League would be, or what it would remain. This membership might, and did, vary periodically a good deal. It was a shifting membership. At one time it might comprise States A, B and C; at another A and B might have dropped out, and D and E have come in. This kind of thing occurred from time to time. Article 7 was not intended to apply to any of these States, A, B, C, D, *or* E, *as such*. It was intended to apply to any State which, at any given moment was—and only if and so long as it was—a Member of the League. It was not intended to apply otherwise. Therefore, if Article 7 conferred a right on Ethiopia and Liberia, the present Applicants, it was solely as a consequence of the fact that they happened to fulfil the criterion specified, namely membership of the League. Otherwise they would not have had this right.

Consequently there can, in our opinion, be no doubt at all that during the lifetime of the League, membership *was* a condition, and that the Permanent Court would have held itself incompetent to adjudicate in the case of a dispute between the Mandatory and a non-Member. An analogy is afforded by the fact that when Germany, before she became a Member of the League, claimed (as a Party to the Treaty of Versailles in which the Covenant and Article 22 were embodied) to be entitled to intervene about the administration of a former German territory under Belgian Mandate, the German complaints were not answered by the League Council, and Belgium as Mandatory stated that all such matters were "within the exclusive competence of the League of Nations" [1].

Similarly, we entertain no doubt, and we do not think there can be any doubt, that a country such as, for instance, Brazil, which was a Member of the League at first, but subsequently left it, thereupon lost its rights under Article 7, and that the Permanent Court would have declared itself incompetent in any proceedings brought by Brazil under that provision.

What then would be the difference in principle between such a case as Brazil's and that of the Applicant States in these proceedings? It may be suggested that a difference arises out of the different

[1] *League of Nations Official Journal*, VIII, pp. 316-317.

manner in which League membership was terminated. Strictly speaking, of course, the particular reason why the specified capacity, or membership of the specified class is lost, is quite irrelevant. The fact alone suffices. However, we will deal with the point. Brazil, it may be said, voluntarily and deliberately left the League, and therefore obviously could not continue to enjoy the same rights as before; whereas the Applicant States did not renounce their membership —they lost it. The League came to an end, and therefore they necessarily ceased to be members of it. But it has to be asked, why did the League come to an end? It did not simply lapse. The answer is, of course, that it came to an end by the act of the Applicants themselves in joining with the other Members of the League to dissolve it. Even if it had been the case that the League came to an end for reasons quite outside its Members' control, and contrary to their will, the fact of the cessation of the status and capacity of League membership would have remained. But even this is not the case. Termination was the act of the Members of the League themselves. Moreover, although, as the Record shows, the case of the mandated territories was fully considered both at San Francisco when the United Nations was founded, and at Geneva when the League was dissolved, no provision was made to meet the type of case which has now arisen. For reasons which will appear later, we reject the view either that this was due to a mere oversight, or that such provision was in fact implicitly made in the course of the final debates at Geneva and by the League resolution concerning mandated territories of April 18, 1946.

It seems to us, therefore, that the action of the Applicant States in joining to bring about the cessation of their League membership was fully as voluntary and deliberate as Brazil's; and we can only see a difference of method between the two cases. We consider that the Applicants, by divesting themselves of their League membership, without making provision for the position thus created in relation to Article 7 of the Mandate, put an end to their rights under that provision, just as completely as Brazil did.

Even if the matter is placed on the basis that the Members of the League, whether or not actually parties to the Mandate, were granted specific third-party or third-State rights by Article 7, the difficulty remains. Even if there are principles of third-State law which might otherwise cause those rights to survive, they can only survive according to their terms. The States concerned having, by their own act, divested themselves of the capacity in which they enjoyed these rights, can no longer claim them, even on a third-

State basis; for no doctrine of third-State rights can extend to enabling third States to continue to claim rights they have themselves, in effect, renounced.

* * *

(b) *Application of the general principles of law relative to capacity*

In case the view stated above is thought to be unduly strict, we would draw attention to the universally received general principle of law—one essential to the orderly conduct of affairs—that rights available to a person or entity in one capacity, do not remain available in another capacity—or if the first capacity comes to an end—unless special arrangements have been made to produce this result. This is constantly seen in the sphere of private law. Trustees, administrators, curators, legal guardians, etc., have certain particular rights appertaining to their status in these capacities. The moment such a status ceases, rights which are attached to the status, and do not exist independently of it, also cease to exist. Similarly, powers or faculties may be enjoyed in a specified capacity. A change over to another status or capacity, or simply continued existence as an individual, cannot carry with it the retention of rights enjoyed in a previous capacity. In the same way, the mere fact that the Applicant States in this case continue to exist as *States;* or that, instead of being Members of the League, they are now Members of the United Nations, gives them in itself—in the absence of special arrangements to the contrary—no right at all, especially after they have themselves terminated their League membership, to continue to invoke a provision available only to Members of the League.

It would hardly seem necessary to insist on such an elementary point. Yet insist we must, since in our view it has been in substance ignored by the Court. For instance, much has been heard in this case of what might be called the "policing the Mandate" aspect of Article 7. But could it seriously be suggested in every-day life that if a police force is disbanded, its ex-members can still go on exercizing their former police functions? This would seem to be an extraordinary notion for any Court of law to endorse. If the former Members of the League had any "police" functions under Article 7, it was as Members of the police force which was the League—a force now disbanded and dissolved.

Moreover—and this is not without its significance—it is not the case, even if it were legally relevant, that the substance of the

Mandatory's obligation would remain unaltered if this were now owed to former Members of the League. This is because of the different consequences that may result from a Judgment of the present Court, as compared with the Permanent Court, having regard to Article 94, paragraph 2, of the United Nations Charter.

Whatever the comparison between that Article and Article 13 (4) of the Covenant, it is evident that there are substantial differences between the two Articles. It is hardly appropriate to develop these differences here; it is sufficient to say that in our opinion, not only are the consequences that may flow from Article 94 (2) of the Charter different from those which could have resulted from Article 13 (4) of the Covenant, but they could be more onerous in character. Moreover, the Council was bound by the unanimity rule. Furthermore, under the Covenant it was for the Council, and for it alone, to initiate what action, if any, it would propose, whereas the effect of Article 94 (2) of the Charter is to invest the judgments of the present Court with a backing of possible sanctions or enforcement action at the instance of a State in whose favour judgment has been pronounced. If, therefore, the Mandatory is still under an obligation, by virtue of the combined effect of Article 37 of the Statute and Article 7 of the Mandate, it is one that, potentially, has different and more burdensome consequences than before. Thus to say that the Mandatory is not being asked to submit to anything more than it would have had to submit to in the days of the League is clearly incorrect; and this situation, in our opinion, constitutes an absolute bar to any extension or perpetuation of the Mandatory's obligations under Article 7, above and beyond its actual language, unless this can be justified beyond possibility of reasonable doubt on the basis of some applicable principle of legal interpretation or general rule of law, particularly since it is reasonably evident, we think that it is precisely in order to bring Article 94 of the Charter into play that the present proceedings have been brought.

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Since, in our view, the position is quite clear on the basis of the actual language of Article 7, and of the ordinary law as to capacity, we turn next to the question whether there is any applicable principle of interpretation which would justify a different conclusion. Two may be suggested: the principle of "maximum effect", and the principle of the "presumed intentions of the parties".

* * *

(c) *The principle of "maximum effect"*

This principle is one which can be employed in order to give as full a scope to a provision as is *reasonably* consistent with its

language, and with the general circumstances of the case; but only if such an interpretation would be so consistent. It cannot be employed to "re-write" a provision in a manner positively inconsistent with, or even actually contrary to what it says. Equally, its application must be excluded if the circumstances are such as to evidence a complete lack of any basis for the interpretation that would result. We shall show later, in dealing with the facts relative to the dissolution of the League, why we think that this is precisely what the circumstances do show. For the moment we will merely point out what the interpretation contended for by the Applicants would really involve, for it is our view that before the principle of "maximum effect" may with legal propriety be applied, one must be prepared to write out the changes that would be required in the provision concerned, if it had originally been drafted so as expressly to produce the effect contended for; and having done that, to consider whether the result remains within the bounds of what can reasonably be regarded as legitimate "interpretation", or whether is goes beyond that, and amounts to a revision or quasi-legislative "rectification" of the provision in question.

In the present case, the interpretation the Applicant States contend for could have been effected expressly by changes in either Article 7 of the Mandate or in Article 37 of the Statute. Changes in Article 7, *expressed* in its terms, could only have been effected at the time when Article 7 was drafted, and must be considered on that basis. Two possible methods may be envisaged. One would have been to replace the phrase "another Member of the League of Nations" by "any other State" or "any other interested State" or "any other State which at any time is or has been a Member of the League". We consider that the chances of the Mandatory, or for that matter any of the Mandatories, having been willing in 1920 to accept any such sweeping wording—even if anyone had suggested it—can be regarded as negligible.

Alternatively, the result contended for could have been achieved by adding after the words "another Member of the League of Nations", some such phrase as "or, should the League at any time be dissolved, any State which was a Member at the date of dissolution". In the next following subsection we shall give our reasons for holding that it is quite out of the question that any such language should have been employed in 1920.

As regards Article 37 of the Statute, what would be necessary would be to suppose that it had contained (and to read it as containing) an additional paragraph running somewhat as follows:

> "Whenever any such treaty or convention provides for the reference to adjudication of disputes between Members of the League of Nations, it shall, in the event of, and notwithstanding, the dissolution of the League, be deemed to relate to disputes between States who were Members of the League at the date of its dissolution."

It is our considered opinion that those who drew up the revised Statute at the preliminary Washington Conference of March-April 1945, and subsequently at San Francisco, would never have taken the leap in the dark which such a commitment would have involved, without carrying out a most careful preliminary investigation of the treaties that might be affected, in order to see just what such a commitment would amount to. No such investigation was, so far as we are aware, ever carried out; and in the circumstances, we do not believe it is possible to imply in Article 37 such additional words as would have produced the effect contended for, as if they had been originally included in terms.

To sum up on this point—we consider that the application of the principle of maximum effect in the present case would involve an inadmissible degree of rectification of the provisions concerned, altogether exceeding the bounds of what is possible by way of legitimate interpretation. We would recall that in the second phase of the *Peace Treaties* case (which had certain marked affinities with the present one), the Court took exactly the opposite line to the one it is now taking. Despite a finding that some of the parties were in breach of what the Court had held to be a treaty obligation to appoint their members of certain three-member tribunals provided for under the Peace Treaties, the Court nevertheless rejected the view that, in the circumstances, the relevant adjudication clause could legitimately be interpreted so as to permit a two-member, instead of a three-member, tribunal to function. To do that, the Court held, in a phrase which has since become part of the common stock of international legal phraseology, would be "not to interpret treaties but to revise them". In short, the Court refused to rectify a provision which, on its actual terms, and in the circumstances which had arisen, was inadequate to produce the result contended for. It is precisely such a rectification which the Court is in our view now effecting, and with considerably less legal warrant than would have existed for a rectification in the *Peace Treaties* case.

Another reason why extensive interpretations of Article 7 are not justified unless there is the clearest warrant for them, is the unilateral character of that provision. It could be invoked against, but not by, the Mandatory, even if the latter should itself want a legal ruling on some point relating to the Mandate arising in a dispute with another Member of the League. This makes it all the more necessary to interpret Article 7 strictly, or at least scrupulously.

* * *

(d) *The presumed intentions of the parties*

We now turn to the second principle of interpretation on the basis of which a different conclusion from the one we have come to may be urged. It has been a major contention in this case that in the life-time of the League, although some States might, by leaving the League, lose their right to invoke Article 7, there always remained other States which could invoke it, so that Article 7 could never become a dead letter. If, however, Article 7 had to be read according to its strict language now, there would—so the argument runs—be no State which could invoke it, so that it would cease to operate at all; this void can never have been intended by the original framers of the Mandate, consequently it must be filled by reading Article 7 as still conferring rights on ex-Members of the League.

Since a situation in which there would be no States qualified to invoke Article 7 could *only* arise by reason of the complete dissolution or break-up of the League, this contention must presuppose either that the original framers foresaw that possibility, or that, had they foreseen it, they would have provided for it, and would have done so in the sense contended for by the Applicants.

It is clear that if the framers actually foresaw the possibility, then their failure to provide for it must have been deliberate, and therefore the argument based on their "presumed intentions" would lead to the opposite conclusion, namely that the void ought not to be made good by any interpretative process.

It is, however, evident that those concerned did *not* foresee, and would have refused to contemplate, a possible break-up of the League. But even supposing them to have done so, we can see no ground on which it could legitimately be assumed that they would have made express provision for the continuance in force of Article 7, of the Mandatory's obligation to submit to compulsory adjudication. If any assumption at all could be made, it would have to be in the opposite sense, for the circumstances in which a break-up of the League would or might occur, must necessarily have been quite unforeseeable in 1920; and it is as certain as anything can be that none of the Mandatory Powers (not only South Africa) would have been willing to accept a obligation unlimited in point of time to submit to adjudication, which would still remain operative in a situation the nature of which nobody could predict. At that date (1920) willingness to submit to compulsory adjudication at all was a comparative rarity, and would certainly not have been forthcoming for an obligation of limitless duration under unknown conditions.

What the Applicants are really asking the Court to do, is to interpret Article 7 in the light of the presumed intentions of the

parties as these might have been expected to be had they foreseen not only that the League would be dissolved, but the circumstances in which this would occur, i.e. that the League would be followed by the United Nations, that the trusteeship system would be set up, and so on. But it is not a legitimate process of interpretation to read a provision on the basis of presumed intentions deduced in the light of nothing but after-knowledge. One can only deduce intentions in the light of what the parties might reasonably have been expected to foresee at the time, and not on what those intentions might have been had the parties had an actual foreknowledge of the future, which they could never in fact have had.

The time for facing, and providing for, the consequences of the break-up of the League, so far as Article 7 was concerned, was of course not in 1920, when the Mandate was framed, but in 1945-1946, when the League was breaking up. However, this was not done; and we shall presently give our reasons for thinking that this was not due to any oversight but deliberately and for good cause. This being so, we know of no principle which, merely because matters have not in fact turned out as the parties, or some of them, may have anticipated, would enable, let alone require, a Court of law to take remedial action in the guise of some process of interpretation.

* * *

3. *Other contentions*

We have now to consider certain other contentions on the basis of which it has been claimed that the Applicant States in this case are entitled to invoke Article 7. These are founded on more or less extraneous considerations, such as the situation which has now arisen in regard to the Mandate, or the provisions of other instruments, etc. A number of these arguments we will not deal with, partly for reasons of space, but mainly because they do not seem to us to be legal arguments at all. They are no more than motives or reasons for urging that it is politically desirable that the Applicants should be allowed to invoke Article 7, and that the Court should assume jurisdiction. This feeling, understandable though it may be, cannot have any bearing on the legal issues involved, and these must be our sole concern.

Another group of arguments which do have a legal character—though in our view they are unsound—we shall not deal with because they are not effectively relied upon by the Judgment of the Court in the present case, although they were much discussed by the Parties in their written and oral pleadings, and were directly or indirectly relied upon by the Court in the 1950 case—such as for instance the argument based on Article 80, paragraph 1, of the

United Nations Charter [1], or on a supposed "carry-over" or devolution of the functions, powers or rights of the League of Nations and its Members in respect of mandated territories, in favour of the United Nations and its Members.

The contentions we shall deal are broadly of three kinds, based *(a)* on the institutional character of the Mandate, and its survival as an institution, if not as a treaty or convention; *(b)* on the allegedly essential and necessary function performed by Article 7 in the scheme of the Mandate; and *(c)* on assurances said to have been given by the Mandatory in 1946 in anticipation of the dissolution of the League, and to have involved an agreement to be bound by Article 7 in relation to any State which was a Member of the League at the date of its dissolution.

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(a) *The institutional basis and effects of the Mandate*

The contention advanced under this head is briefly that the admitted survival of the Mandate as an institution necessarily implies its survival complete and with all its parts intact, including Article 7. If, however, Article 7 could only be invoked by Members

[1] Article 80 (1) of the Charter has nothing to do with the Court's jurisdiction.

It has however been sought to call it in aid as follows: the Article, it is said, "conserved" the rights of States; one of these rights was that stated in Article 7 of the Mandate instrument; therefore the right survived the League dissolution until the mandated territory was brought under trusteeship.

The argument is not only inherently unsound, it ignores the words of Article 80 (1). This Article is clearly an interpretation clause, commonly called a saving clause, of a type frequently to be found in legislative or treaty instruments, designed to prevent Statute or Treaty provisions being *interpreted* so as to operate beyond their intendment.

Such a clause does not, except in a loose and quite indefinite sense, "conserve" any rights. It prevents the operation of the Statute or Treaty from affecting them (whatever they are and whatever their content) except as provided by the Statute or Treaty. Article 80 (1) does not maintain or stabilize rights as they existed at the date of the Charter coming into operation, nor does it insure the continuance of those rights or increase or diminish them. It leaves them unaffected by Chapter XII of the Charter.

What Article 80 (1) does not say is as important as what it does say. It does not say that rights shall continue. It does not provide that these rights shall not thereafter, until trusteeship agreements have been concluded, be subject to the operation of law, or that they shall not terminate or be extinguished by effluxion of time, failure of purpose, impossibility of performance or for any other reason. It does not say these rights shall not be altered or be subject to alteration even by normal legal processes.

It is evident that the purpose of Article 80 (1) was quite different to what has been contended and does not lend itself by any rational method of interpretation to support the contention advanced. The sole purpose of the Article was to prevent any provision of Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event.

of the League of Nations (now non-existent) it would for all practical purposes not have survived. Hence any State which was a Member of the League at the time of its dissolution must be entitled to invoke it.

This contention seems to us to involve two fallacies. The first is the view that the survival or continued existence of an institution does necessarily entail the survival or continued existence intact of all its parts. We will return to this. The second is that survival can somehow operate to add stature to the institution, so to speak, giving it an added effect, and that a provision can survive otherwise than in accordance with its own terms. In our opinion, Article 7 has survived only in the sense that it has not been actually excised from the Mandate instrument, and still stands on paper as part of the original League of Nations Resolution or Declaration of December 17, 1920. As part of the Mandate instrument, and on the basis that this instrument is or represents a treaty or convention in force, the Court must determine the application of Article 7 and may do so (and in our view may only do so) by finding that, as it only gives rights to Members of the League, the Applicants cannot invoke it. The Court cannot, in our view, properly apply it in any other way, for if it still stands part of the Mandate instrument, then by that very token it stands part of it in the same terms as it was originally framed for purposes of insertion in that instrument, and which have never been amended. The Court could not therefore both rely on the continued presence of Article 7 in the Mandate instrument, and refuse to apply it in accordance with the terms in which it figures there.

But, correct as this is, we do not wish to rest our view on any mere argument of logic. The substantial grounds on which we reject the contention based on the survival of the Mandate as an institution are first, that we regard as fallacious the view that if an institution survives, all its parts must survive too; and secondly, that we regard as incorrect the further view that a provision for compulsory adjudication, such as Article 7, has such a character of inherent necessity in the context of the Mandates System, that a continued and substantive field of application must be postulated for it, as an essential element of the System.

As regards the first of these questions, there is in fact no principle of international law which requires that because an instrument or institution survives or continues in existence, it must necessarily do so with respect to *all* its parts on a completely non-severable basis. The position is quite the contrary: international law postulates no incompatibility between the survival, or continued existence of an international agreement, organ or institution, and a termi-

nation or cessation, on one ground or another, of some particular part of it, or of particular functions, rights or obligations provided for by it. This situation is indeed rather a common one, and it quite often occurs that, for instance, an instrument remains in force, but that some particular provision of it ceases or has ceased any longer to be operative, because its terms have become inapplicable, or because it is now impossible of performance, or for some other reason.

If an inspection of a particular clause shows that, although an instrument or institution survives as such, the clause concerned is no longer possible of performance, or can no longer be applied according to its terms (as is the case with Articles 6 and 7 of the Mandate) then the *prima facie* conclusion must be that although the instrument or institution otherwise remains intact, that particular clause is at an end.

The only circumstances in which it might be possible to maintain the contrary, would be where the provision concerned was of so fundamental and essential a character that the instrument or institution could not function without it. Accordingly we must now consider whether, in the legal sense, a character of inherent necessity attaches to Article 7 of the Mandate as to justify its application in the manner decided upon by the Court.

* * *

(b) *The argument from necessity*

We here reach the heart of the present case, for the claimed essentiality of Article 7 of the Mandate instrument is not only the very root from which has grown the contention that an agreement was entered into by the Mandatory in 1946 to continue to regard Article 7 as applicable (we deal with this later): it also provides both the root and many of the branches of most, if not all the contentions in favour of the assumption of jurisdiction in the case. If Article 7 is not an essential element of the Mandate, all the arguments of any real substance presented in favour of the assumption of jurisdiction fall to the ground. The first question therefore is how such terms as "essential", "inherently necessary", etc., are properly to be understood. Bare assertions of necessity unsupported by any legal criteria are insufficient. The main ground upon which the necessary character of Article 7 is predicated in the present case, is that it was considered essential in the interests of the peoples who were as yet unable to stand alone that there should be a "judicial supervision" of the discharge by the Mandatory Power of its international obligations of the sacred trust. That necessity, it is urged, must somehow or other be given effect to.

Having regard to the view we take on the third preliminary objection, namely that Article 7 was not instituted for the protection

of the inhabitants of the mandated territory at all, we obviously could not accept any plea of necessity based on the above-mentioned ground. But even if we took a different view about that, we should still reject this ground. Merely to show that the provision or clause concerned is desirable, or that it is a good thing to have it, or that it serves a useful purpose, is not enough. Far more than that is required.

In our opinion what is required is that the provision or clause be of such a character that the instrument, institution or system it relates to *will not function without it*—quite a different thing. In general, provisions for adjudication have not been regarded as having this character in relation to the instruments they figure in. In rare and somewhat special cases they may have. An example is afforded by, for instance, the 1958 Geneva Convention on the Conservation of Fisheries on the High Seas, in which elaborate provisions for compulsory arbitration are built into the body of the treaty as an essential part of the method of determining what measures of conservation on the high seas are legitimate under the Treaty. But except in such types of case, provisions for compulsory adjudication, desirable though they may be in principle, have never been regarded as a *sine qua non* of the operation of a treaty, and any such suggestion would normally meet with strong opposition. Their mere presence in a treaty, for which there may be a variety of reasons, is no indication of necessity.

Equally the absence of Article 7 would have left the Mandate in no different and no worse position than hundreds of other instruments not containing any adjudication clause. If, instead of the Permanent Court, the Article had provided for a reference to Arbitrators, one of whom was to be the holder of a designated office and that office subsequently, for any reason, ceased to exist, could it be said that the Article, being no longer capable of performance, this would have gone to the root of the whole Mandate and thus put an end to it. The answer clearly would be "No". In principle the same answer should be given should the Article as framed fail of further performance for any reason. The Mandate could still subsist without the Article, just as it could have done if the Permanent Court had come to an end and no successor Court had arisen.

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A more specific ground of "necessity", heavily relied upon, is the fact that by reason of the unanimity rule which prevailed in the Council of the League of Nations (including, when Mandates questions were under consideration, the vote of the Mandatory itself) the Council, in the last resort, could not impose its own view

on the Mandatory. Since the Council could only ask the Permanent Court for advisory opinions which would not be binding, and since under Article 34 of the Statute of the Court, only States could appear before the Court as litigants and obtain a binding decision, therefore it was essential, so it is claimed, in order to protect the sacred trust, for a Member or Members of the League to be able to invoke Article 7 and bring the dispute to the Permanent Court for adjudication.

Of all the arguments advanced in this case, this seems to us to have the least substance. There is in our view no conceivable warrant for supposing that it was ever intended to be a part of the Mandates System that the Council of the League should be able to impose its own view on the Mandatory. The existence of the unanimity rule shows the exact reverse, and therefore proves the contrary.

Moreover, can it be seriously imagined, if it had been the intention of those who created the System that the Council should, in the last resort, be able to bind or coerce the Mandatory, that this would have been left to the chance possibility that some individual Member of the League would be willing to intervene (in a matter that in no way affected its own interests as a State), and to espouse the cause of the Council, in the same way that the present Applicants have done on behalf of the United Nations Assembly in what is essentially a dispute between the Respondent State and the Assembly? Such processes may be carried through now. They were not even thought of in 1920, and certainly were not contemplated under the Mandates System.

Article 22 of the Covenant, and Article 6 of the Mandate, provided for reports to be rendered by the Mandatory to the League Council. The very fact of the unanimity rule coupled with the further fact that under paragraph 5 of Article 4 of the League Covenant, the Mandatory had to participate in the vote, shows that the system was one which was intended to be worked by a process of discussion, negotiation, and common understanding. The whole idea of imposing anything on the Mandatory was foreign to it.

Still more foreign to the climate of opinion of that time would have been the idea of using individual Members of the League for the purpose. In our opinion, as we make clear in connection with the Third Preliminary Objection, the real object of Article 7, and the similar articles in other Mandates, was not to enable the individual Members of the League to protect the interests of the Council or the League *vis-à-vis* the Mandatory, but to enable them to protect their own interests and those of their nationals, in the mandated territories. Particularly in the case of the "A" and "B" Mandates, these could be considerable. Because the Council's main concern would not be over such interests, but would relate chiefly to the conduct of the Mandate, *vis-à-vis* the inhabitants, it was considered

necessary to give the individual Members of the League a direct and independent right of action in the matter. Even if, however, we are wrong as to that, we should still consider, for the reasons we have given, and others we shall come to, that Article 7 was regarded as an incidental and in no way an essential element of the Mandate.

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There is yet another ground, possibly unavowed but evident enough, on which the "necessity" of Article 7 is predicated. Looking at the matter as a whole and in the light of its history since the dissolution of the League, it seems to us quite clear that the Applicants (and we think the Court also) are seeking to apply a sort of principle of "hindsight" and are basing themselves on some doctrine of "subsequent necessity" quite unknown to international law. What has happened is that a provision which was originally of incidental importance and, as will be seen, practically never used, has, because of recent events, acquired an importance, and is seen (because of Article 94 of the Charter) to have potentialities which it did not originally possess. In present circumstances, so it is argued, it is only through Article 7 that any control can be achieved over the Mandatory.

This may be understandable, but it is not a valid *legal* argument. It no more affords legal grounds for reading new terms into Article 7 than there would be for claiming the rectification of a frontier in a given region because, subsequent to the date when the frontier was fixed forty years ago, valuable mineral deposits have been discovered in that region. Subsequent events may affect the *importance* of a provision: they cannot affect its intrinsic legal character which, by reason of the principle of "contemporaneity" in interpretation, must be adjudged on the basis of the place the provision occupied in the context of the system or framework it formed part of, at the time when the latter was set up. Changes in this context may increase the importance of the provisions concerned: they do not alter its intrinsic legal character, or give rise to new rights in respect of it [1].

[1] Many examples could be given. For instance if, in a system of communications governed by treaty (e.g. air navigation), the use of certain routes is subjected to the consent of the States through or over which these routes pass, the fact that owing to climatic or other changes other routes, the use of which is uncontrolled, become blocked or unusable, may increase the importance of States permitting an extended use of the controlled areas. It could not however be argued from this that such consent need no longer be obtained. The legal character of the provisions concerned would remain unaffected by the increased importance in the system of the subject-matter they related to.

In the present case, events have increased the importance of invoking Article 7 if it can be invoked at all. But they cannot create a legal right to invoke it which did not previously exist, or impart to it a legal character of inherent necessity which, in the original scheme of the Mandate, it did not have.

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There are a number of other factors which show quite clearly that it would be wrong to regard Article 7 as having any essential or inherently necessary character in the scheme of the Mandate. We have already pointed out that it did not figure as one of the "securities" or safeguards provided for in the League Covenant, and which, according to Article 22, paragraph 1, of the Covenant were to be provided for in the Covenant itself. Provision was duly made in Article 22 for reports to be rendered by the Mandatory to the League Council and for setting up a Permanent Mandates Commission to advise the Council. Presumably this was because an obligation to report was regarded as being of the essence, as a necessary part of *any* Mandate System that was to fulfil the objects stated in Article 22. The conclusion is inescapable that it was not regarded as similarly necessary that the Mandatory should be obliged to submit to adjudication, and this therefore, if it was ever thought of at all when Article 22 of the Covenant was framed, was left to be settled outside Article 22, in the instrument defining the terms of the Mandate. In any case, the terms of Article 22, paragraph 1, preclude anything not provided for in the Covenant from ranking as essential for the functioning of the Mandate

Precisely the same position was established for, and exists in relation to the United Nations Trusteeship System. The Charter contains elaborate provisions for administrative supervision, the setting up of a Trusteeship Council, etc.; but any obligation to submit to compulsory adjudication is left for inclusion, if at all, in the individual trusteeship "agreements". Furthermore, while some of these embody this obligation, others do not. This we regard as a very significant fact. Three out of the four "C" Mandates, which were brought under the trusteeship provisions of the Charter of the United Nations, did not contain in the respective trusteeship agreements any comparable clause. These three were the Trusteeship Agreements for the territories previously held by Japan under Mandate, and those which related to New Guinea and Nauru. In none of these is there to be found any adjudication clause.

If Article 7 was of such an essential character in the performance of the Mandate and in order to safeguard and ensure the interests of

the peoples of the Mandates territories, it was just as essential that similar provisions should be inserted in the trusteeship agreements relating to these same peoples and territories. But what is said to have been essential the moment before placing under trusteeship, seems to have been considered no longer so the moment after. Yet the basic principles of the Trusteeship System were the same as those of the Mandates System.

This consideration of itself reveals, we think, the artificiality of the claim that Article 7 was a fundamental necessity for the working of the Mandate System.

It is sought to neutralize or explain this away by reference to the different voting systems in the League and in the General Assembly of the United Nations; in the former the unanimity rule for all decisions, in the latter two-thirds majority on all important questions. This, so it is claimed, dispensed with the fundamental necessity of Article 7 as soon as a mandate territory was brought under the Trusteeship System.

If this difference in the two voting systems could have had the significance asserted, it would seem somewhat unusual that an Article claimed to have been of the very essence of the Mandate System should have been discarded or omitted from these three trusteeship agreements without a query from anyone why it was to be dropped, and whether, if it were dropped, the safeguarding of the "sacred trust" was likely to be affected and to what extent.

It is, we think, stretching credulity too far to accept the view (if Article 7 was so fundamentally necessary under the Mandate System) that when these three Mandates were brought under trusteeship, repeating in the trusteeship agreement in substance the substantive provisions of the Mandates themselves, nothing would have been said by anyone in the General Assembly, or that no record would remain explaining the omission. The Article was abandoned without a word.

The explanation advanced breaks down on other grounds. The General Assembly has no power, except on a limited number of matters, to make decisions relating to the administration of trusteeship territories; it may only make recommendations. One would think that if Article 7 were essential under the Mandate System it was hardly less essential under the Trusteeship System. It is not apparent what difference in principle would exist in this respect between the two systems merely because of the voting procedure in the League as compared with that applicable in the General Assembly. In either system a trustee State could have proved recalcitrant and disregarded the views of, in the one case the Mandates Commission and the Council of the League, and in the other the Trusteeship Council and the General Assembly. If the need in the former system for recourse to the Court in order to be

able to obtain judgment against the trustee State in the interests of the indigenous peoples was essential, it would seem equally essential under the Trusteeship System.

Moreover, one of these three Mandates, namely that previously held by Japan, was converted into a strategic trusteeship under the United States in respect of which the General Assembly was excluded from all the functions of the United Nations relating thereto [1]. Only the Security Council could exercise those functions, and any "decisions" made by it would appear to be subject to Article 27 (3) of the Charter requiring the affirmative consent of the trustee State —the United States itself.

If so, the foundation of the explanation falls away. If not, we must be prepared to believe that the Members of the Security Council when approving this particular trusteeship agreement took it for granted—it went without saying—that Article 27 (3) did not apply, at least to the vote of the trustee State. We think this is wholly improbable.

Furthermore, no explanation is forthcoming why, in the remaining "C" Mandate brought under trusteeship at the same period—that relating to Samoa—the adjudication clause did appear, despite the fact that its necessity had, on the Court's reasoning, disappeared.

What purpose, then, was the clause in this particular trusteeship agreement designed to serve [2]? And what purpose was the same clause contained in all the other trusteeship agreements for the territories—previously the "A" and "B" Mandates—intended to serve, since overnight, as it were, it no longer continued to be necessary to serve its original purpose.

The purpose or intent of the clause did not in our view alter. If it was not essential under the Trusteeship System neither was it under the Mandate System.

Finally Article 7 was not, in the Court's view, limited in its operation to cases where the Council was unable to act and so bring the Mandatory Power to book because of the unanimity rule. Thus, it permitted a State, not a Member of the Council to seek a judgment against the Mandatory State even against the wishes of the Council or indeed the majority of the Members of the League. In the ultimate analysis the fundamental necessity of Article 7 is predicated on the eventuality of it being necessary to protect the sacred trust even against the unanimous view of the

[1] Article 83 of the Charter.

[2] It is manifest, we think, that the purpose of the adjudication clause—whatever that purpose was—remained the same under both systems. However, as we will establish when dealing with the third Preliminary Objection, its purpose was not that stated by the Court. It related exclusively to the statal individual interests conferred by the respective Mandates upon States, Members of the League and their nationals. These were minimal in the case of "C" Mandates but quite extensive in the case of the "A" and "B" Mandates.

Council, charged, as it was, under the Covenant itself, with the duty of supervision

In our view the fact that in three of the four trusteeship agreements in relation to the previous "C" mandated territories—whose peoples, of all those covered by Article 22 of the Covenant of the League, were the least able "to stand by themselves"—did not contain this so-called fundamentally essential judicial supervision clause, whilst in those for the much more developed peoples (the previous "A" and "B" Mandates) the replica of Article 7 was included, is hardly consistent, to say the least, with the thesis of essentiality. At the barest minimum it is strong evidence against it.

A further point which may legitimately be taken into account in estimating the degree of "necessity" to be attached to Article 7 is the extent to which it has in fact been utilized. After all, a period of forty years is not negligible; and while recognizing to the full the justice of Judge Read's remark in the 1950 case, that the utility of an adjudication clause could not be determined merely by reference to how often it was resorted to, since its mere existence might act as a deterrent to breaches of the instrument concerned, it nevertheless remains the fact that, if the *Mavrommatis* cases are treated as basically phases of the same case, the present case is only the second occasion in forty years on which the adjudication clause of *any* Mandate has been invoked, and the *first*, after forty years, in the case of a "B" or "C" Mandate. Moreover, since the *Mavrommatis* cases had reference to the interests of a national of a Member of the League in the Mandated territory concerned, the present occasion is the first on which any question of the conduct of the Mandate in relation to the inhabitants of the Mandated territory has been raised for judicial determination.

Perhaps more significant is the doubt as to the class of disputes covered by Article 7—the point raised in the Respondent's third preliminary objection. It would surely be difficult to regard as basic, essential, inherently necessary and non-severable, indispensable to the functioning of the Mandate, and therefore as something which must by one means or another be preserved and perpetuated, a provision which, even now, the Court has only found by the narrowest of majorities to relate to the conduct of the Mandate, rather than simply to the specific individual interests in the Mandated territory, of the several Members of the League, and their nationals. Such manifest uncertainty, continuing for so long, is not readily compatible with the view that the provision concerned constitutes an indispensible element of the system it forms part of.

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In our opinion the various considerations discussed above can justify only one conclusion—that the case for viewing Article 7 as an essential and inherently necessary part of the Mandates System has not been made out. Consequently this plea cannot be made the basis of any right of the Applicant States to invoke the Article.

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(c) *The alleged Agreement of April 1946*

The Court comes to the conclusion that an agreement [1] was reached among all the Members of the League at the Assembly meeting in April 1946, to continue the different Mandates with reference to the obligations of the Mandatory Powers, notwithstanding the dissolution of the Organization.

The issue involved, is in its context whether this alleged agreement applied to *Article 7* (and the corresponding clauses in other Mandates), and if so with what effect. As has been pointed out earlier, Article 7 involved a unilateral undertaking on the part of the Mandatory alone to go before the Permanent Court at the instance of other Members of the League. No amount of "agreement" on the part of these other Members could have sufficed to perpetuate the obligation of the Mandatory after the dissolution of the League. What would have been required to achieve that, *if sufficiently direct, explicit and unequivocal,* would have been an undertaking on the part of the Mandatory itself from which, in all the surrounding circumstances *an agreement* between itself and each and every other State then a Member of the League may conclusively be inferred. We leave aside consideration of whether such an agreement could be within Article 37 of the Statute, since it would exist, if it exists at all, only from a point of time subsequent to Article 37 coming into operation. We leave aside, as well, consideration of whether such an agreement, if established, could fall within the provisions of Article 36 (1) of the Court's Statute, or if such an undertaking could be regarded as an unilateral declaration under Article 36 (2) and (4) of the Statute.

We direct and confine ourselves to the real question to be answered, namely, did the Mandatory, either in a speech or statement, or by joining in a League Assembly resolution, give such an undertaking in any terms which enable it to be held that the Mandatory

[1] The Court does not indicate whether the agreement stated to have been arrived at was "tacit" or otherwise.

clearly engaged itself to renew or perpetuate, in relation to former Members of the League, a compulsory adjudication clause which, on its actual language was about to lapse?

Put in that way, it seems to us that the question answers itself—and in the negative—so soon as the relevant statements and resolutions are considered.

The pronouncements relied on by the Court as regards Article 7 of the Mandate for South West Africa are a statement made by the South African representative at Geneva on April 9, 1946, and paragraphs 3 and 4 of the League Assembly's resolution of 18 April, which was adopted unanimously. We look in vain in these for anything that would have the effect contended for.

We do not find it necessary to consider the question, pertinent though it is, of how far purely unilateral statements made in this way at international meetings, or how far participation in any resulting resolutions, can give rise to strictly binding legal obligations. What is quite clear is that the League resolution of April 18, 1946, did not even purport to impose or record any obligations. It merely *took note* of certain antecedent statements of *intention*, as it expressly recites.

These statements, made by all the Mandatories (not only South Africa), were made in very general and, in some cases at least, cautious and somewhat guarded, indeed limited terms. They mention no specific obligations under the Mandates, and in our view are no more than statements of intention made to the League on the eve of its dissolution. Nor is the League resolution any different.

Furthermore, it seems to us clear from the general character of the South African statement and the use of such phraseology as "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*" (italics ours), that what the Mandatory had in mind was the actual process of the administration of the territory vis-à-vis its inhabitants, and not collateral obligations of another kind owed to Members of the League [1]. For instance, we would not regard such a statement as involving any promise to continue, after the dissolution of the League, the commercial and

[1] This is borne out when the statement as a whole is read, part of which (in its context) might be emphasized namely the words: "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."

other rights reserved by the Mandates for the Members of the League or their nationals, and we stress this because it is not merely Article 7 and the adjudication clauses of the other Mandates that are involved here [1]. If any provisions of this character continue in force, they do so for other reasons, and certainly not by virtue of the type of statement made by the South African representative (and on behalf of other Mandatory Powers) at Geneva.

Exactly the same picture emerges from the final League resolution of April 18, 1946. Its concluding paragraph refers to "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 in the respective mandates, until other arrangements have been agreed...", etc. (italics ours).

Coupled with earlier references to the coming dissolution of the League in this and the statements of the various Mandatories [2], all this could be regarded almost as a recognition that, upon this dissolution, the Mandates, as such, would cease to be in force, but that, pending other arrangements, the territories concerned would, in relation to their inhabitants, continue to be administered *as if* the Mandates were still in force, or on the same *basis* as that of the Mandates. What the League was concerned with was not specific obligations owed by Mandatories to States nor the rights or interests of States or their nationals but with the interests of the indigenous

[1] Indeed it is open to argument whether all the provisions of the Mandate instruments were consistent with the provisions of the Charter of the United Nations by the terms of which most States Members of the League were already bound.

[2] It will be useful to summarize the manner in which each of the other Mandatory Powers present stated their intentions as to the future observance by them of their obligations (the italics are ours). Thus, Great Britain stated its intention was to continue to administer "in accordance with the *general principles* of the existing Mandates"; France that it intended "to pursue the *execution of the mission* entrusted to it"; Belgium that it would remain *fully alive* to the obligations devolving upon Members of the *United Nations* under Article 80 of the Charter; New Zealand that the dissolution of the League did not diminish her obligations "to the *inhabitants* of the territory ... [which] would continue to be administered in accordance with the terms of the Mandate for the promotion and advancement of the inhabitants"; whilst Australia stated that the League's dissolution would "not be regarded by it as lessening the obligations imposed on it" by the Mandates *System*, which it regarded as having full force and effect. Moreover, when on 12 April 1946 the draft resolution was in the committee stages and adopted for submission to the Assembly of the League, the representative of France (no one in any sense expressing any other view) stated that its territories would continue to be *administered* in the *spirit* of the *Covenant and* of the *Charter*.

peoples, and to be assured of "the continued application of the *principles* of the *Mandate System*" [1].

However that may be, it is quite clear to us that these statements and resolutions cannot be regarded as constituting binding undertakings to continue to apply all the provisions of the Mandate, integrally, and irrespective of how any particular clauses would be affected by the dissolution of the League; and we are unable to see how a Court could infer from them an undertaking of any kind, let alone the indefinite prolongation of a jurisdictional obligation about to lapse according to its terms. For this, we think much more would have been required, something explicitly directed to that obligation. It is one thing, on the basis that the dissolution of the League might be regarded as terminating *the whole Mandates System* (which is what we think those at Geneva had in mind), to imply (on *that* basis) from what was said, an undertaking to continue to apply those provisions of the Mandate which had reference to the inhabitants of the territory, and were not, according to their terms, directly dependent on, or harnessed to, the continued existence of the League or of League Membership. It is quite another thing to draw similar implications where it is not merely a matter of keeping the system as such alive, despite the termination of the League, but of also keeping alive particular clauses, such as Article 7, specifically related to the existence of the League or the fact of League Membership. Here we think that the limits of permissible implication are reached. Nothing short of an undertaking specifically directed to the clause concerned, or to the class of clause, would have sufficed in relation to this type of provision. No such thing is to be found in the South African statement, or in any of the statements of other Mandatories or in the relevant League resolution. Indeed, as we have pointed out, the explicit references to, and only to, the administration of the territory in the interests of the inhabitants, constitutes a definite contra-indication.

In the case of the Union of South Africa, another consideration makes this conclusion even clearer. In both the South African statement and in the League resolution of April 18, 1946, the references to what was intended are stated to be in view of or *pending other arrangements*—in short a temporary situation was envisaged. But it is quite clear from the express language used in the South

[1] See statement of representative of China when presenting the draft resolution in Committee, *L. of N., O. J., Spec. Sup.* at p. 79.

African statement, that what the Union Government had in mind were arrangements for the incorporation of the Mandated territory in the territory of the Union; and consequently, as had already been foreshadowed by the Union in earlier statements, that the territory would not be, or at least was most unlikely to be, brought under the United Nations trusteeship system. Whether this was politically or otherwise a desirable attitude for the Mandatory to take up, is not for us to say. The fact is that it did so, and the legal conclusion we draw is that it is quite inconceivable that a State which was aiming at the incorporation of the Mandated territory in its own territory could possibly have been willing, or be thought to have been willing, or to have been intending to imply willingness, simultaneously to perpetuate, possibly indefinitely, an obligation of compulsory jurisdiction which, on its term, was just about to become inoperative.

Of course the question of Article 7 (and the corresponding provisions of other Mandates) was never specifically raised at Geneva. Nor indeed is there the slightest evidence that its provisions were in the minds of the representatives of the Member States. The Court's finding on this part of the case implicitly assumes that, *had it been*, the various Mandatories would all immediately have agreed to the continuance of this obligation. We see absolutely nothing in the record to justify, and a good deal to negative this assumption—even in the case of Mandatories other than South Africa. In the case of the latter, we think the inherent probabilities are so obviously against it, as to place the matter virtually beyond discussion. The general merits of such an attitude are not for us to pronounce upon. The legal position is that if, in view of the dissolution of the League, any Mandatory had been asked explicitly to agree to continue to apply Article 7 in respect of *ex*-Members of the League, it was within the legal competence of any such Mandatory to refuse—for if an obligation is about to become inoperative as, on its own terms, Article 7 was, its renewal or perpetuation can only be by consent. Consequently, if there are grounds (as there clearly are) for thinking that South Africa, on an explicit raising of the matter, would in fact have refused consent—or not improbably would have done so—then it obviously becomes quite impossible to *imply* from the Union's Geneva statement any undertaking to *accept*—even if such any undertaking could otherwise be implied from those statements, which in our view it cannot be.

Finally, it is obvious that any undertaking to continue with the obligations of Article 7 in relation to "ex-Members", or "former Members", of the League, would have needed precise definition. Just what States were to be regarded as coming within these categories (original Members, Members at the date of dissolution, countries at any time Members, Members also Members of the United Nations, etc.)? The moment the League was dissolved, there would evidently be more than one class of State which would have at least a possible claim to be considered. The question of what precisely are the entities to which any obligation to have recourse to compulsory adjudication relates (and therefore what precisely are the entities entitled to invoke it), is always and necessarily fundamental to the scope of the obligation. This can never be presumed: it requires to be defined or stated; and this alone is a reason why an implied undertaking by the Mandatory in relation to an uncertain class of beneficiary cannot be inferred from the statements and declarations of 1946.

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The conclusions we arrive at above as to the correct scope and interpretation of the statements made, and the resolution adopted at Geneva in April, 1946, are amply confirmed by certain other elements in the history of the matter, to which we now come.

* * *

(d) *The general treatment of the Mandates question in the period 1945-1946*

The course of dealing with the question of Mandates, both in the United Nations and in the League, during the period 1945-1946, serves to confirm the conclusions we have arrived at in the preceding sections of this part of the case, both generally and, more particularly, as regards the effect to be attributed to the statements made and the resolutions adopted at Geneva in April, 1946. It also confirms the view we have already expressed that the failure to deal more explicitly with the question of the position of the Mandates after the dissolution of the League, and especially the failure to make any provision for the situation which would arise if any mandated territory, not being one that had attained independence, was not placed under the United Nations trusteeship system, was not *per incuriam* but deliberate.

(1) In the first place it emerges quite clearly from the record that the whole approach of the United Nations to the question of the activities of the League of Nations was one of great caution and indeed of reluctance. It is crystal clear [1] that there was a definite rejection of any idea of what might be called a general take-over or absorption of League functions and activities. We have already mentioned in another connection that in the United Nations Assembly resolution providing for the transfer of certain functions and powers of the League, and for ensuring (subject to certain reservations) the continued exercise of its technical activities, the subject of the League's *political* functions such as, *inter alia*, those relating to Mandates, was dealt with quite differently. In this field the Assembly was only willing to act upon a specific request of the parties to assume the exercise of functions of the League, and even if such a request were received (none ever was) the Assembly was only willing to "examine" it, or "submit [it] to the appropriate organ of the United Nations"—not exactly an enthusiastic attitude. As stated, no such request was ever made, and no political functions of the League were, as such, taken over or assumed [2], though of course in a number of ways, parallel functions were assumed by the United Nations under its own Charter, e.g. in the sphere of peace-keeping.

(2) The United Nations did not therefore take over the League Mandates system as such, or any specific functions in connection with it. On the other hand, this was one of the matters which was "paralleled" in the Charter, namely by the institution of the United Nations trusteeship system (Chapters XII and XIII), *and by the other provisions in the Charter relating to non-self-governing territories (Chapter XI and Article 73).*

(3) In short—and we wish to stress this—there was from the start an *election* (choice) on the part of the United Nations to deal with the question of non-self-governing territories (a category under which we think the Mandated territories—or at the least the "B" and "C" territories—unquestionably came) by means of the provisions of Chapters XI, XII and XIII of the Charter, and not by taking over, and supplementing or modernising, the League Mandates System.

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[1] See Summary Records of the Preparatory Commission of the United Nations set up at the end of the San Francisco Conference, U.N.P.C., Committee 7, pp. 2-3 and 10-11.

[2] This is one reason why we think that the view expressed by the Court in its 1950 Opinion, to the effect that the supervisory functions of the former League Council passed to the Assembly of the United Nations which was entitled to exercise them, was definitely wrong.

(4) This was a deliberate policy, as is shown by a number of things. One of the most striking is the fact that, as the Court confirmed in its 1950 Opinion, those who framed the Charter created no obligation under it for Members of the United Nations administering Mandated territories to bring these into the trusteeship system. The San Francisco Conference did, on the other hand—and this again we stress—by means of Chapter XI of the Charter (and more particularly by Article 73 which we shall consider later) create a position which, according to our view of it, involved that any Mandated territory *not* placed under trusteeship must be dealt with by the Mandatory as a non-self-governing territory under Article 73 of the Charter, in respect of which the obligations (including the reporting obligations) of that provision must be carried out.

(5) It is clear that the Members (or prospective Members) of the United Nations at San Francisco and thereafter, looked to the bringing into trusteeship of all mandated territories other than such as attained independence. But the deliberate character of their decision (evidenced by their conduct) not to make any provision for the possibility that this expectation might not in every case be realised (apart of course from the provision made by Chapter XI and Article 73), can be seen in relation to the Mandate for South West Africa from the statement which the representative of the Union of South Africa made on 11 May 1945 in Committee II/4 of the San Francisco Conference [1]. In this he indicated in the clearest possible terms the intention of the Union to claim the incorporation of the mandated territory in the national territory of the Union. Moreover, we see no reason to doubt the statement made on behalf of the Respondent State (in the written Memorial setting out its preliminary objections) to the effect that the declaration which the Union Government made at San Francisco included (though this does not appear on the record) an intimation that the Union Government must not be held "to have acquiesced in the continuance of the Mandate or the inclusion of the [mandated] territory in any form of trusteeship under the new International Organization" [2]. The fact of this South African Statement, which was long and extremely explicit, coupled with the fact that Chapter XII of the Charter, despite its various references to the mandated territories, deliberately refrained from imposing any obligation to bring them into trusteeship, makes it impossible, we think, to suggest there was any misapprehen-

[1] Summarily recorded in U.N.C.I.O. Docts,, Vol. 10, p. 434. The full statement, the accuracy of which has not been challenged, and which accords with an unofficial verbatim record in the possession of the U.N. Secretariat is given in the Respondent's written Preliminary Objections, pp. 25-26—and see footnote 1 on page 26.

[2] See footnote 1 on page 26 of the Respondent's written Preliminary Objections. It has equally not been contested that this further passage was in fact included.

sion, or to argue, on that ground, that the Court should, by judicial action, make provision for a case which the framers of the Charter did not see fit to provide for themselves—presumably because they hoped it would not occur, or were prepared, if it should occur, to leave to the application of Article 73 of the Charter. The fact that, in the event, South West Africa was the only mandated territory not brought into trusteeship, obviously cannot be a *legal* ground for dealing with this territory on any different basis from that which would have obtained if its case had been the rule and not the exception. It cannot, in law, be a question of imposing a sanction on the Mandatory for not having followed the same course as its fellow-mandatories when it was under no legal obligation to do so. It can only be a question of establishing what are the legal consequences of this, having regard to the dissolution of the League. This brings us to our next point.

(6) The possibility that some mandated territories might not be brought into trusteeship was not the only one accepted by those attending the San Francisco Conference—they also took the risk that the termination of the League might, *unless specific provision were made for this*, affect the continued applicability of particular clauses of the mandates, clauses which, by their terms, were geared to the existence of the League and of membership of the League. This risk they must be presumed to have run with their eyes open, since the coming termination of the League, by one means or another, *was a political aim and intention of all those Members of the League (including the Applicant States) who were present at San Francisco.*

(7) There was a sufficient discussion of the whole question of Mandates (as also at Geneva in April 1946, to which we shall come) to make it legitimate, and indeed necessary, to assume that those concerned were familiar with the various instruments of Mandate, and were aware that certain clauses of these instruments could not, *according to their terms*, function or remain operative on the same basis after the termination of the League, *and the termination of League membership*, unless express provision were made to meet the case; and accordingly that such express provision would have to be made, or else any consequences involved would have to be accepted. But, amongst other omissions, no provision was made to meet the fact that, after the termination of the League there would be no Members of the League at all, and therefore no States which could invoke Article 7 according to its terms, if the right to do so was (as in principle it must be) confined to States of the class specified in it.

(8) If June 26, 1945, the date of the signature of the Charter, represented in practice the last occasion on which, under the Charter itself, any provision could be made for the case of a mandated territory not being placed under trusteeship, or for meeting any problems that might be created by the coming dissolution of the League, it was by no means the last occasion of any kind on which something could have been done about these things. There was still the occasion of the dissolution of the League itself. Since a large proportion of the Members of the League (including the Applicant States) were also Members of the United Nations, and vice-versa, the basis for a concerted policy existed. There was equally the occasion of the adoption of the United Nations Resolution XIV (I) of February 12, 1946, already referred to, stating the terms on which the United Nations would be prepared to take over political functions from the League, such as those relating to mandates. These terms, as we have seen, were not encouraging—a fact significant in itself. But it remained open to the League (not dissolved until April 1946) or to the parties to any "international instrument" to make a formal request to the United Nations to assume the exercise of any such functions. No such request was ever made.

(9) It was not only *not* made, but when, at Geneva in April 1946, the representative of China presented a draft Resolution (quoted in full in a footnote on p. 538 below) the effect of which would have been to request the United Nations to take over the supervisory functions of the League Council in respect of the conduct of the Mandates, this draft was not proceeded with. Instead, the Resolution which we have considered under sub-section (c) immediately preceding this one, was adopted (for text, see the same footnote on p. 538)[1]. The question of the United Nations taking over functions from the League Council is of course not the same one as that of the right of former Members of the League to go on invoking the adjudication clause of the Mandate. But they are closely related. Both hinged on the dissolution of the League, and the two Assemblies appear to have been equally indifferent to both. The one question was at least raised by the original Chinese resolution. The other was never raised at all, and there is no indication that anyone was interested in raising it; yet it is impossible (and it really has to be excluded in point of law) that those concerned were unaware of the terms of provisions such as Article 7, or of the

[1] The contrast between the original Chinese draft and the one eventually adopted constitutes an additional reason why we find it impossible to accept the view taken by the Court in 1950, that the functions of the League Council in respect of Mandates had passed to the United Nations; for this was the very thing which the original Chinese draft proposed but which was not adopted.

effect that the dissolution of the League would have on these provisions, if no counter-action was taken.

(10) We have already drawn attention to, and cited, the very general and guarded types of statement made about the Mandates at Geneva. But even before that, the matter had been further discussed in the Preparatory Commission of the United Nations set up at the close of the San Francisco Conference to function during the interim period before the Charter would come into force, and before the first part of the first United Nations Assembly would be held in January 1946, and to prepare for this. In this Commission, most of those who met at Geneva to dissolve the League were represented. They were therefore aware of what had taken place in the Preparatory Commission. The Commission set up an Executive Committee. This Committee prepared a Report in view of the first session of the United Nations Assembly. Part III of Chapter IV of this Report proposed the setting up of a Temporary Trusteeship Committee to carry out, in the intervening period, certain of the functions that would eventually fall to the United Nations Trusteeship Council[1]. One of the functions the Executive Committee proposed for such a Trusteeship Committee—and we draw particular attention to this—was to

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

Amongst the responsibilities which, according to the argument of the Applicants in this case, was essentially necessary for the functioning of the Mandates System, was the function of "judicial supervision" of the Mandate. It is therefore instructive to note what happened to this proposal. *It was not adopted by the Preparatory Commission*, and was replaced by a recommendation to the United Nations Assembly that it should adopt a resolution calling on Member States administering Mandates, to submit trusteeship agreements in respect of them for consideration at the second part of the first Assembly in the autumn of 1946[3], a recommendation eventually adopted by the Assembly, in Resolution XI of February 9, 1946.

(11) Yet in the discussions in the Preparatory Commission in December 1945, which preceded the formulation of this recommen-

[1] Document PC/EX/113/Rev. 1, Chapt. IV, Sec. 2, para. 3, p. 55. A Sub-Committee of the Executive Committee included in its report to the latter *(inter alia)* the following observation: "Since the questions arising from the *winding up of the Mandates System* are dealt with in Part III, Chapter IV, no recommendation is included ..." *Ibid.*, Chapt. IX, See 3, paras. 1, 2 and 5, p. 110.

[2] *Ibid.*, para. 4 (IV), p. 56.

[3] Document PC/20, Chap. IV, Sec. 1, p. 49.

dation, there were further indications that no automatic transfers of Mandated territories into the trusteeship system could be expected. Speaking on December 20, 1945, the representative of Australia, while expressing sympathy with the aims involved, denied that there was any obligation to bring mandated territories into trusteeship, and insisted that in this respect there was no difference between these territories and any other form of dependent territory[1]. The representative of South Africa on the same occasion[2] and again three days later[3] once more made the most explicit reservations.

(12) When the Assembly itself met in January 1946, all this was repeated. The representative of South Africa made further similar statements (January 17 and 22)[4]. The representative of the United Kingdom (same day) announced a decision to start negotiations in respect of Tanganyika, the Cameroons and Togoland, but expressed willingness actually to bring them into trusteeship only if satisfactory terms could be negotiated, and reserved the case of Palestine entirely, for special reasons[5]. The representative of France (19 January) said that the French Government intended "to carry on with the work entrusted to it by the League of Nations", but believing that a transfer into trusteeship "would be in the spirit of the Charter", it was prepared to "study" the matter, subject to certain reservations[6]. More than one statement referred to the necessity for obtaining the approval of the peoples of the mandated territories. Other statements of willingness in principle to place mandated territories under trusteeship were made on behalf of Australia, Belgium and New Zealand.

(13) In its resulting Resolution XI of 9 February, the Assembly in "inviting" the negotiation of trusteeship agreements, welcomed

> "the declarations *made by certain States* administering territories now held under Mandate, of an intention to negotiate trusteeship agreements in respects of *some of these* territories..." (italics ours[7]).

Even if one attributes the wording of the italicised passages partly to the existence of special cases such as those of Palestine

[1] U.N.P.C. Committee 4, Summary Records, p. 39.
[2] *Ibid.*, p. 40.
[3] U.N. P.C. Journal, p. 131.
[4] G.A.O.R., First Session, First Part, 12th plenary meeting, pp. 185-6; and *ibid.*, Fourth Comm., 3rd meeting, p. 10.
[5] *Ibid.*, 11th Plenary, pp. 166-167.
[6] *Ibid.*, 16th plenary, p. 231.
[7] U.N. Document A/64, p. 13.

and Transjordan (about to attain independence), and to the fact that Japan, which administered a number of mandated territories in the Pacific, was then neither a Member of the United Nations, nor present at the Assembly, nor to be present at Geneva in April, this was not the whole picture. There was also the fact that the statements made on behalf of South Africa could not possibly have been construed as "declarations of intention" to negotiate a trusteeship agreement for South West Africa; and it was in any case clear that, both with regard to that territory and other mandated territories, the position was uncertain, and would depend (even in the case of those territories in respect of which declarations of intention had been made) on the negotiation of satisfactory trusteeship agreements.

(14) Such then was the position when the Members of the League of Nations met at Geneva in April 1946, many of them having been represented at the United Nations proceedings above-mentioned, and all of them aware of these. What transpired has already been described under the previous section (c) of this part of our Opinion. The contrast between the original draft Chinese resolution, presented by the representative of China but not proceeded with, and the eventual resolution of the League Assembly is so glaring and revealing, that we set out both resolutions verbatim in a footnote [1].

* * *

[1] The original Chinese draft read as follows:

"The Assembly,

Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories trusteeship;

Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of interregnum in the supervision of the mandatory regime* in these territories [italics added];

Recommends that the mandatory powers as well as those administering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trusteeship Council shall have been constituted."

The Resolution finally adopted by the League Assembly was the following:

"The Assembly:

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

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

We shall state presently the reason which we think underlay the attitudes both of the United Nations and of the League Assemblies. Here we will state what appears to us to the legal significance of these attitudes, so far as the present affair is concerned.

It seems to us impossible, on the facts as we have described them, and looking at the matter as a whole, to take any other view than that both the United Nations and the League Assemblies were fully aware of and alerted to the whole implications of the mandates question, and of the dissolution of the League relative to that; or that alternatively they must, on the facts (and even simply as a presumption of law), be held to have been. *Apart from what was provided for by Article 73 of the Charter* (see next section), they deliberately refrained from making provision for the situation which might arise if any mandated territory was not placed under trusteeship, or if there were long delays—although forewarned that this very situation might arise. They refrained equally from any attempt to adapt the Mandates to the situation arising from the termination of the League and of League membership.

They not only "refrained", but at least twice (proposal of the Executive Committee of the Preparatory Commission of the United Nations—head (10) above; and original Chinese resolution at Geneva) they *rejected* proposals for a transfer of League functions respecting Mandates to the United Nations. Acceptance of either of these proposals would naturally not, of itself, have got over the difficulty about cessation of League membership. It would probably have brought that question into the open, but this is not the point. Our concern here is simply to show that the two Assemblies were (exept for Article 73 of the Charter) unwilling to provide in *any* specific way for the consequences of the termination of the League and its membership, or for a possible eventual failure to bring a mandated territory into trusteeship. In this lies the key to the whole matter.

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2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' Mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community;

3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

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

It is the key to the whole matter because it is strikingly evident that the two Assemblies (and the Applicant States were Members of both) relied, and *preferred to rely*, on the hope or expectation that the mandated territories would eventually be brought into trusteeship. Whether this was a reasonable assumption in the case of South West Africa, considering the declarations that were made on behalf of the Union Government, is another matter. The fact remains that it *was* relied upon, in the full knowledge of facts from which it was manifest that the expectation might not be realized, and of the fact that the Mandatory was under no legal obligation in the matter.

It seems to us fairly clear as a matter of reasonable inference, that an important part of the reason for this attitude was the desire to avoid even the suggestion that any mandated territory might not be brought into trusteeship; or, by providing for the situation that might arise if that was not done (and if the League had in the meantime been dissolved) to appear to be countenancing such a situation by providing for it, or to be giving grounds on the basis of which any Mandatory could contend that, express provision having been made for continuing the Mandates *as* Mandates, no further action was required.

In short, given the view that they took of the whole matter, those concerned thought it unnecessary to provide for this situation and better policy not to. This course having been chosen, and the possible consequences it entailed accepted, there is no legal principle which would enable a Court of law to put the clock back and, by judicial action, make provision for a case which those concerned elected not to deal with, for reasons which appeared to them good and sufficient at the time.

The fact that subsequent events have shown the policy to be mistaken in the particular case of South West Africa, cannot of course provide any justification for judicial rectification. This would be to apply a principle of "hindsight" which we have already said is not a legitimate one. The fact is that, making the best political judgment they could in the circumstances of the time, the two Assemblies pursued the course they thought was wisest —nor is it certain they were wrong, considering the matter as a whole[1]. It is not for a Judge today, in the light of the greater knowledge granted him by the passage of time, to do more than apply the law as it is, in the light of the facts as they stood when the situation he is dealing with arose.

[1] It may well have resulted in former mandated territories being placed under trusteeship that otherwise might not have been. But if a given course has advantages, its corresponding disadvantages must, in law at any rate, be accepted.

* * *

But it would be doing an injustice to those concerned to suppose that they were indifferent to their responsibilities .They were not. They knew of the protective cover which was provided by Article 73 of the Charter, and to this we now come.

* * *

(e) *The role of Article 73 of the United Nations Charter*

It must be evident to anyone who reads Article 73 of the United Nations Charter, in conjunction with Article 22 of the League Covenant, that the provisions of the one were fashioned to a major extent upon those of the other. The similarity not only of concept but of language is striking, and in order to show the affinity between the two, we reproduce the text of the first paragraph of each in a footnote [1].

Article 73 provided for a number of obligations for Members of the United Nations administering non-self-governing territories, to some of which we shall refer, and in particular it provided (by its sub-paragraph *(e)*) for a reporting obligation to the United Nations which, if less stringent and comprehensive than that provided for under the Mandates (and under Article 6 of the Mandate for South West Africa), was nevertheless far from negligible, as events in the United National Assembly have amply demonstrated. This provision (Article 73) was not in any way confined to the case of Mandated territories, but it undoubtedly covered that case, as we shall show.

Here then was the provision which, though set aside as irrelevant by the Court in 1950, did in fact afford a reasonable measure of coverage *(in so far as it was considered necessary or desirable to provide any)* against the possibility that some Mandated territory

[1] Article 22, paragraph 1, of the League Covenant was as follows:

> "To those colonies and territories which aas consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that the securities for the performance of this trust should be embodied in this Covenant."

The opening and governing paragraph of Article 73 of the Charter reads:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end: ..."

might remain outside the trusteeship system or remain outside for a prolonged period [1].

That Article 73 would not, in respect of such a provision as Article 7 of the Mandate for South West Africa, have served in itself to cure the defect arising from the termination of all League Membership can only afford further evidence of, and confirm the fact that the Members of the United Nations never attached any particular importance to the adjudication provisions of the Mandates, a view equally confirmed in respect of the League Assembly by the character of its final resolution on Mandated territories of April 18, 1946, already considered.

The view that Article 73 does not apply to Mandated territories is, we think, legally untenable, at any rate as regards any territories under "B" or "C" Mandate, having regard to the affinities of Article 73 with Article 22 of the Covenant. The former was clearly intended to apply to a much larger range of territories than the relatively small class of the Mandated territories; but it would be a strange consequence if a concept devised expressly to relate to that class should, when extended to other territories, thereby be held to have ceased to apply to the class it was originally devised for, especially given that the States administering territories in this class were under no obligation to bring them into the trusteeship class. This would indeed have been to leave them high and dry in a sort of international no-man's land.

We do not believe this was the intention of the Charter, and the reference to Chapter XI (containing Article 73) made in paragraph 3 of the League Resolution of April 18, 1946 (see pp. 538-539) shows that the view we have expressed was equally the view taken at the time. The reference to Chapter XI would otherwise be meanincless.

Article 73 declares itself to relate to "territories whose peoples have not yet attained a full measure of self-government"—a definition precisely covering Mandated territories of the "B" and "C" class. In almost the language of Article 22 of the Covenant, its major obligation is "to promote to the utmost ... the well-being of the inhabitants of these territories", and to assure "their political, economic, social and educational advancement". Again, the reference it contains to the "sacred trust" constitutes the very hall-mark of the whole Mandates concept. These affinities cannot be ignored, nor is their legal import open to serious question we think.

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[1] The striking thing is that from early in its existence the United Nations Assembly was unwilling to allow that Article 73 related to Mandated territories. It is easy to see why: to have received them might to some extent have weakened the case for insisting that the Mandated territories must be brought into trusteeship, and must not be dealt with like other non-self-governing territories. This is a matter of opinion: but as a matter of law, it can only confirm us in the view that the Assembly's attitude in respect of Mandated territories was throughout based on a policy of "trusteeship only", and this has extended even to denying the applicability of Article 73 to Mandated territories not placed under trusteeship.

It is quite clear that their import was not doubted at Geneva in April 1946, and that the decision of the League Assembly to make no specific provision in respect of Mandated territories was in part based on this. Nothing could in fact be clearer on the basis of the very Resolution of April 18, 1946, on which the Judgment of the Court relies in order to reach a different conclusion. This Resolution recited, *inter alia*, that "*Chapters XI*, XII and XIII of the Charter of the United Nations" (italics ours) embodied "principles corresponding to those declared in Article 22 of the Covenant of the League"; and this was one of the grounds on which the League Assembly was content merely to "take note of the expressed intentions" of the Mandatory Powers to continue to administer "for the well-being and development of the peoples concerned", etc.

Exactly the same point was made by the representative of Australia on the same occasion when, after saying that the Australian Mandated territories would eventually be brought into trusteeship, and would in the meantime be administered in accordance with the Mandates, he continued:

> "Until then the ground is covered not only by the pledge which the Government of Australia has given to the Assembly today, *but also by the explicit international obligations laid down in Chapter XI of the Charter... There will be no gap, no interregnum to be provided for*" (italics ours) [1]

The point made in this statement about there being "no gap, no interregnum" may be compared with the language of the original Chinese draft resolution reproduced in the footnote on p. 538 above.[2] The same point was repeated by the representative of Australia in the General Assembly of the United Nations in November 1947, even more explicitly, as follows:

> "... we have put into the Charter a special Chapter dealing with non-self-governing territories. This was in order to meet the position of territories such as mandated territories which are not placed under the trusteeship system—a territory like South West Africa... Therefore there is no gap in the Charter of the United Nations." [3]

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[1] L. of N. O. J., Special Supplement No. 194 at page 47.

[2] It is evident, we think, that at least some of the Mandatory Powers did not share the view of the representative of China as indicated in his original resolution, that there was an interregnum; and this explains the fact that another and quite different resolution was introduced. It explains also the significance of the reference to Chapter XI in the League Assembly resolution, a reference which was disregarded by the Court in 1950 and continues to be disregarded by it.

[3] UN. Records General Assembly (2nd Sess. Plenary Vol. 1, 1947 at 587-588).

Indeed at San Francisco in 1945 the President of Commission II, Field Marshall Smuts had stated that Chapter XI

> "... applies the trusteeship principle to all dependent territories whether they are mandates, whether they are territories taken from defeated countries, or whether they are existing colonies of Powers. The whole field of dependent peoples living in dependent territories is now covered." [1]

That this view was commonly held in 1946/1947 and immediately thereafter appears from the Written Statement of the United States presented to the Court in 1950 (1950 *Pleadings, Oral Arguments, Documents* at pp. 124 *et seq.*); of the Government of the Philippines (at pp. 249 *et seq.*); and from the statement made to the Court on behalf of the Secretary-General of the United Nations on the same occasion [2].

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It seems to us that the conclusion, and the only conclusion, that can be drawn from all this is the following. First, there is absolutely no warrant for implying from anything that was said or done at Geneva in April 1946, any undertaking, express or implied, by the Mandatory, or any general agreement, in relation to Article 7. The indications are quite to the contrary. Article 7 and its subject-matter was far removed from the minds of the Members

[1] Doc. 1144 II/16 U.N.C.I.O. Vol. 8, at p. 127.

[2] *Ib.* at 224. We also quote more fully from the statement made by the representative of Australia to the Assembly of the League on April 11, 1946, as follows (italics ours):

> "The Charter of the United Nations has now extended its basic paragraphs in two directions. First, the Charter applies to *every* dependent territory administered by Members of the United Nations the principle that the primary object of administration must be to promote the welfare and development of the inhabitants of dependent territories, and that the administering authority should render to an international authority an account of its administration. *This is laid down in Chapter XI of the Charter.* 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.
>
> Secondly, the Charter provides in Chapters XII and XIII for the establishment in relation to certain categories of dependent territories of an international trusteeship system. *The basic objectives are the same as in Chapter XI* for dependent territories generally, but, under the International Trusteeship System, a further step is taken with power not merely to consider reports made by administering authorities but to visit trust territories and examine at first hand the manner in which the administering authorities are discharging their trust. These powers of inspection go *beyond what the Covenant permitted to the Permanent Mandate Commission.* The trusteeship system, strictly so called, will apply only to such territories as are voluntary brought within its scope by individual trusteeship agreements." (L. of N. O.S. Special Supplement No. 194, p. 47.)

of the League (and of the United Nations). There was during the course of the whole debate not one word about judicial supervision or adjudication. An examiniation of the record of the debates together with the text of the resolution of the Assembly makes it clear that the subject matter to which alone they related was the obligations of the Mandatory Powers to the indigenous peoples—the substantive obligations, which are those to be found in Article 22 of the Covenant and repeated in the different Mandates.

Secondly, it is clear that all concerned decided to rest content with what they had done, namely with creating the trusteeship system, into which Mandated territories could be brought (but without any legal obligation to do so); with establishing the régime of Chapter XI for non-self-governing territories, which included Mandated territories not brought into trusteeship, but did not include provision for compulsory adjudication; and with taking note of the declarations of intention made by the Mandatories to continue (pending other arrangements) to administer the territories in general accordance with the Mandates, for the well-being of the peoples of the territories.

Beyond this, those concerned were not prepared to go and did not go. In particular they neither made, nor intended to make—except as just stated—any provision to meet the situation resulting from the termination of the League and of Membership of the League; or any provision to meet the situation which would or might arise if, such termination having taken place, a Mandated territory was not brought into trusteeship.

* * *

The onus of proving the existence of an agreement entered into by the Mandatory Powers in relation to Article 7 lies upon the Applicants. In our view this onus has not been discharged.

* * *

Conclusion on the Second Preliminary Objection: in final conclusion on this part of the case, we revert to that aspect of the matter which must be relevant to all arguments and counter arguments as to the Respondent State's obligation under Article 7—and that is the fundamental principle of consent, given generally or *ad hoc*, as being the essential foundation of the jurisdiction of an international tribunal. This principle is not any the less applicable to an obligation to have recourse to judicial settlement contained in an instrument such as the Mandate, than it is in the case of a similar obligation arising under other instruments; indeed, there are two reasons,

which we have already mentioned, why it applies with even greater force; namely, *first*, that in the case of the Mandates, the Mandatory alone undertook, and was obliged to submit to adjudication at the instance of other Members of the League, and could not itself compel a similar submission; and *secondly*, the different consequences of a judgment of the present Court, due to the existence of Article 94 of the Charter. The unilateral character which Article 7 possesses, obviously makes it all the more necessary to interpret it strictly when it is invoked against the Mandatory, and not to extend its scope beyond what the Mandatory may fairly be held to have agreed to.

It would seem that, in implying the consent of the Mandatory to submit to compulsory adjudication at the instance of former Members of the League, the argument based on hindsight is again being used. It is almost conclusively demonstrable that the Mandatory, in 1920, could not have been contemplating the eventual dissolution of the League, and that if it had done so, it would certainly have refused to agree to any adjudicatory obligations continuing after such an occurrence.

The *scope* of any consent given, must necessarily be assessed in the light of the circumstances as known and existing at the time when the consent was given. Equally, if that consent is to be related to future events, then it must be assessed in the light of what could reasonably have been foreseen at the time, as to those events. Even if there is any basis upon which a dissolution of the League could have been predicted in 1920, that basis would necessarily have been taken to be a break-up of world order—a situation in which no State would be willing to undertake a perpetual obligation to submit to compulsory adjudication—in which indeed, the whole processes of such adjudication might have foundered. Briefly, therefore, if anything could have been foreseen, it would not have been what actually occurred, but its exact opposite.

This is not a reasonable basis upon which consent can be predicated in relation to something which the Mandatory could never have foreseen, and therefore clearly can not be held to have consented to.

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For all the above reasons, we hold that the Second Preliminary Objection must succeed, because the Applicant States, by their own act in terminating the class concerned, have ceased to belong to the class of State entitled to invoke Article 7 of the Mandate, and because no provision was made to substitute for this class (nor did the Mandatory ever consent, or give an undertaking, nor was there any agreement, to regard it as replaced by) any other class to which the Applicant States do belong.

VI

THIRD PRELIMINARY OBJECTION

Under this head the Respondent State denies that there is any dispute between itself and the Applicant States, substantively of the kind to which Article 7 of the Mandate was intended to relate, and it accordingly claims that the condition that there should be a "dispute" within the intention of Article 7 is not fulfilled.

Before we consider this contention, we must deal with a related point. Article 7 requires not only that there should be a dispute, but also that this dispute should be between the Mandatory and "another Member of the League of Nations". For the purposes of this Third Objection it has of course to be assumed that, contrary to the conclusions we have come to on the First and Second Preliminary Objections, the Applicants must be deemed to fulfil the condition of League Membership, or alternatively that the Applicants are entitled to invoke Article 7 despite the termination of their League Membership.

The question still remains however, before we consider the character of the disputes Article 7 was intended to relate to, is there in the present case *any dispute at all*, properly speaking, between the Applicant and the Respondent States? Both on the language of Article 7, and that of the Statute of the Court, and equally as a matter of general principle, what is necessary is that the dispute in respect of which the jurisdiction of the Court is invoked should be a dispute between the actual parties to the proceedings before the Court.

Clearly, a dispute is not created or constituted merely by bringing proceedings, putting in an Application or invoking a compulsory adjudication clause—for otherwise the requirement in the clause (and there always is such a requirement) that there should be a dispute would be redundant. In the present case, is there in the proper sense, any dispute between the *Applicant States* and the Respondent, other than such as arises out of the mere fact that proceedings have been instituted by the Applicants against the Respondent?

It seems to us that there is not. It is common knowledge that the present case finds its whole *fons et origo* in, and springs directly from, the activities of the United Nations Assembly relative to the Mandated territory and the Mandatory. No one who studies the record of the proceedings in the Assembly, and of the various Assembly Committees and Sub-Committees which have been concerned with the matter, and especially the Assembly Resolutions on South West Africa which directly led up to the institution of the present proceedings before the Court, can doubt for a moment that the real dispute over South West Africa is between the Respondent State and the United Nations Assembly, and that the Applicant

States are in fact appearing in a representational capacity to bring proceedings which the Assembly cannot bring for itself because, under Article 34 of the Statute, only States can appear in contentious proceedings before the Court.

On this ground alone therefore, we consider we would be justified in holding that, there being no real dispute between the Respondent State and the Applicant States in their individual capacities, this condition of Article 7 is not fulfilled.

It is admitted that the Applicants have no direct material interests involved in this case. Neither their own national interests nor those of any of their nationals under the Mandate instrument or in the Mandated territory are affected. They are appearing—and this is admitted—solely for the purpose of defending or upholding the Mandate, in the interest not of themselves, but of the inhabitants of the Mandated territory, and this they are doing at the instance of the Assembly, as clearly appears from the Assembly Resolutions of 1361 (XIV) of November 1959, and 1565 (XV) of December 1960.

It is not for us to comment on this process, except in so far as we have to consider what the legal consequences are. We realise that States, parties to a treaty or convention, or who have third-State rights under it, may in certain types of cases be held to have a legal interest in its due observance, even though the alleged breach of it has not, or not yet, affected them directly. But since we do not regard the Mandate as being a treaty or convention, or the Applicant States as being parties to it as such (if it were one) and since we consider them to have lost the capacity under which they might have been able to claim any rights on a third State basis, we could not regard them as having any legal interest in the matter by virtue of any direct participation in the Mandate.

Even if we should be wrong as to that, however, the plain fact is that the real, present interest of the Applicant States in these proceedings is as Members of the United Nations, as participators in the activities of the United Nations Assembly relative to South West Africa, and because of the interest which, on the basis of the Opinion given by the Court in 1950, the Assembly considers itself to have in the question of the conduct of the Mandate. It is well established in international jurisprudence that it is the situation as it stood immediately prior to the commencement of proceedings to which regard must be had. Any "dispute" which the Applicant States then had with the Respondent State was in the United Nations, in their capacity as Members of it, and was conducted within the framework of the Assembly, again as Members of it.

Nor has what has taken place in the Assembly been strictly in the nature of a dispute, properly so-called, so much as a political conflict of views. The Applicant States have not had, and do not have any conflict of view with the Respondent State over and above, or different from, that which a great many of the other States represented in the Assembly have, equally as Members of it; and their interest in the matter is equally no different from or greater than that of many other Members. In particular, they have no specific individual ground of dispute with the Respondent State outside the Assembly, as is shown by their failure to open, or attempt to conduct, any direct negotiations with the Respondent State through the diplomatic channel.

Throughout, up to the time of bringing these proceedings, the Applicants have acted in their capacity as Members of the United Nations; and for all the difference it would have made to the essential character of the present proceedings, these might just as well have been brought by any other States coming within the category of ex-Members of the former League of Nations. *The pleadings could have been identical,* apart from the name of the plaintiffs.

We do not consider that a dispute which has been conducted by a State (if "conducted" is the proper term at all) solely within the framework of an international organization, in its capacity as a member of the organization, and by simple participation in its activities, without the dispute ever having been taken up directly with the defendant State outside the organization, can constitute a dispute between States of the kind envisaged by the normal adjudication clause.

We must therefore conclude that prior to the bringing of the present proceedings (which was not *per se* enough) there was not, properly speaking, a dispute between the Respondent State and the Applicant States as such, within the normal intention of a jurisdictional clause such as Article 7 of the Mandate, and that accordingly the requirement that there should be a dispute between the Mandatory and the Applicant States is not fulfilled.

* * *

The defect to which we have just drawn attention is in a certain sense a technical one, though the technicality is far from being unimportant. But it could be cured by time and appropriate action. We have a more fundamental reason for holding that the dispute, or rather ground of complaint involved in the present case, is not one contemplated by Article 7.

The Mandate (and this is still more so in the case of other categories of Mandates) has two main classes of substantive provisions. The first (which might be called the "conduct of the Mandate" class)

comprises the provisions inserted for the benefit of the peoples of the territory. The other (which might be called the "State rights and interests" class) comprises those which were inserted for the national benefit of the Members of the League and their nationals (commercial rights, open door, freedom for missionary activities, etc.).

The question is whether Article 7 of the Mandate (this was a common clause in all the Mandate), relates to both these classes of provision, or only to the latter. At first sight, on a literal reading of Article 7, the answer might appear clear: it specifies "any dispute whatever ... relating to the interpretation or the application of the provisions of the Mandate". Since we believe in the principle of interpreting provisions according to their natural and ordinary meaning in the context in which they occur, and (in the absence of any ambiguities or contradictions) without reference to *travaux préparatoires*, we must state why we feel unable to take the above passage at its face value, and why we consider a reference to the *travaux préparatoires* to be justified in this case, quite apart from the fact that these have in any event been so extensively relied upon in connection with the First and Second Preliminary Objections, that it would hardly be possible to exclude them from consideration of the third, which is definitely related to the others.

The phrase we have just cited from Article 7 does not give the full sense of the relevant passage, and to obtain this a fuller citation is required, as follows: "any dispute whatever ... between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate". Having regard to the view we take as to the meaning of a "dispute", and the necessity for a direct dispute between the parties to the proceedings, in which they have an interest in their own capacity, and not merely as Members of an international organization, the above passage, in the context of this case, conceals an ambiguity. The words could be read as meaning any dispute whatever having the character just mentioned. In our view the Applicants had not, at the critical date (that of the Applications), any interest in the matter *(even in the conduct of the Mandate)* except in their capacity as Members of the United Nations. On that ground alone we should not regard the case as covered.

*

There is however another much more important ambiguity which makes it necessary to enquire whether "any dispute whatever" means any dispute about the provisions of the Mandate generally, or whether it must be regarded as being confined to any dispute whatever about those provisions of the

Mandate which affect State or national rights or interests. This arises because of the immediately following requirement that the dispute shall be one that "cannot be settled by negotiation".

The implications of this phrase are, in our view, the key to the whole question of what is covered by Article 7. "Negotiation", we think, as contemplated by such a provision as Article 7, means negotiation between the parties to the proceedings before the Court. Under the head of the fourth preliminary objection we shall give our reasons for so thinking. For the moment we will assume, what would certainly have been assumed by anyone dealing with the matter at the time when the Mandate was drafted, namely that negotiation means negotiation between, or directly for and on behalf of the actual parties to the proceedings before the Court.

Now a requirement that a dispute must be such as "cannot" be settled by negotiation, necessarily implies that it be of a type *capable* of being so settled, and of being so settled by negotiation between parties competent for that purpose. If a dispute *could* not be settled (i.e. is inherently incapable of settlement) by any kind of negotiation at all between the parties before the Court, then clearly a requirement that the dispute be one that "cannot" be settled by negotiation would be meaningless.

By 'settlement', we understand final settlement, and a final settlement to us means a settlement negotiated between parties having competence to settle the particular dispute in a final manner. The question therefore arises, could the Applicant and Respondent States, by negotiation *inter se*, settle in any way whatever a dispute not relating to their own State or national rights or interests, but belonging to the "conduct of the Mandate" type—the sacred trust—could any settlement negotiated between single States, such as the Applicant States and the Mandatory, settle any question relating to the general conduct of the Mandate itself? Could any such settlement, arrived at between the Applicants and the Respondent alone, bind any other State conceiving itself to have an interest in the conduct of the Mandate—or bind the United Nations Assembly? Obviously not—such a settlement might be wholly inacceptable to these other entities.

It is not, in our view, a sufficient answer to say that a settlement between the Applicant and Respondent States would have been *a* settlement, inasmuch as it would have precluded the *Applicants* from bringing any proceedings under Article 7. Such a settlement would have settled nothing vis-à-vis any other

State dissatisfied with it, or in the United Nations Assembly[1], and would not, from the point of view of the Respondent, have genuinely settled anything.

It is common knowledge that the present proceedings have been brought because the decision of the Court would be *binding* on the Mandatory. Elementary principles of justice and good faith therefore require that if the Mandatory should be able to achieve a settlement of the dispute directly with the Applicant States (which it has never yet been asked to do) such a settlement should be final, and good *erga omnes*. But obviously any such settlement could not have this effect.

Again, let it be assumed, since that contingency may not be excluded, that, on the merits, the Court found *in favour of* the Respondent. Such a decision would be *res judicata* only for the Applicant States (Article 59 of the Statute). It would not bind the United Nations Assembly, nor would it bind any States except the Applicants. Any other State dissatisfied with it could, at some future time, bring fresh proceedings on exactly or substantially the same grounds, with results that might be the same, or again might not. From the Mandatory's point of view there could be no finality. On the other hand a decision given against the Respondent would be binding on it, and would enable Article 94 of the Charter to be invoked if necessary by the other Party.

The evident disparity between these two situations is not easy to reconcile with normal principles of justice, and we do not believe that anything so lop-sided could have been in contemplation when Article 7 was drafted. We consider that, as its wording clearly implies, this provision was only intended to relate to disputes of a kind which are capable of being settled by negotiation, and of which therefore, in the given case, it can legitimately be held (if the facts so warrant) that the dispute "cannot" be so settled; and we consider further, that the only kind of dispute of that character, is one involving the national rights or interests of the States concerned. These they are competent to settle in a final manner by negotiation. Disputes about the general conduct of the Mandate, in relation to the inhabitants of the territory, are disputes which, in principle, are not capable of being so settled merely by a negotiation between the Mandatory and another State. The obligations of the Mandatory in relation to the "sacred trust" are of their nature not negotiable as between the Mandatory and another State Member of the League. The present dispute is of the latter kind, and therefore we do not consider that it comes under Article 7.

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[1] It is of course no answer to say that in practice the Applicants would not have negotiated any settlement they did not know would be acceptable to the Assembly; or if it is an answer, it is a revealing one which can only bear out our view that the dispute in this case is not really with the Applicants.

*

We now wish to refer briefly to a further point that seems to us of hardly less importance. We find it impossible to reconcile the view that Article 7 relates to disputes about the general conduct of the Mandate, with the supervisory functions given to the Council of the League under Article 6 of the Mandate. The conjunction would mean that although the League Council might have been perfectly satisfied with the Mandatory's conduct of the Mandate, or might even have made suggestions to the Mandatory about that, which the latter was complying with and carrying out, any Member of the League not satisfied with the Mandatory's conduct, or not agreeing with the Council's views, could have brought proceedings before the Permanent Court under Article 7.

There would have been an even more extraordinary possibility. A Member of the League might, on some point relative to the conduct of the Mandate, have obtained from the Permanent Court a decision which was not in fact in the best interests of the peoples of the mandated territory—due, say, to lack of sufficient technical data before the Court. Yet under Article 59 of the Statute, the Mandatory would have been bound by the decision, and obliged to apply it vis-à-vis the inhabitants, although the Council of the League might have been wholly opposed to it and itself not bound by it.

We cannot believe it was ever intended that it should be possible for such situations to arise, and in estimating this, one must, for reasons we have given earlier in this Opinion, place oneself at the point in time when these provisions, Articles 6 and 7, were being drafted as designed portions of a coherent and integrated whole, which the Mandate certainly would not have been if Article 7 had had the meaning attributed to it by the Court.

The situations we have described as capable of arising if Article 7 is regarded as relating to disputes about the conduct of the Mandate are in no way fanciful or hypothetical. One of them has actually arisen in another case, with reference to a provision substantially the same as Article 7 in a United Nations trusteeship agreement.

It is in our opinion hardly conceivable that those who created a system according to which the Mandates were to be exercized "on behalf of the League", and the Mandatory was to be responsible, and solely responsible, to the Council of the League, should have been willing so far to dilute the Council's authority (especially when

the Council could itself go to the Permanent Court for an Advisory Opinion), as to give a wholly independent right of recourse to the Court to Members of the League, not merely for the protection of their own individual rights and interests, but in the very field of the general conduct of the Mandate which was peculiarly the Council's.

* * *

These various considerations lead us to hold that, despite the apparently plain language of Article 7 of the Mandate, on a literal interpretation of the words "any dispute whatever", analysis shows its real meaning and intention to be different, and to exlude disputes about the general conduct of the Mandate. If there is any room for doubt, then this is a case in which reference to the *travaux préparatoires* is justified, in order to see whether they confirm the foregoing interpretation, and to this we shall now proceed.

* * *

Before the end of the Paris Peace Conference of 1919, a Mandates Commission was established to consider possible draft terms for the various Mandates[1]. At its first meeting on June 28, 1919, a draft "C" Mandate in the form of five suggested articles was submitted for discussion. *This draft contained no adjudication clause.* Nor did it contain any clause dealing with freedom of worship or the provisions in relation to missionaries, nationals of any State Member of the League, to enter and reside in the territory, etc., as was subsequently to be set forth in Article 5 of the "C" Mandate instruments.

At its next meeting on July 8, the Commission had before it not only the draft "C" Mandate, but also two draft "B" Mandates, one proposed by the representative of France which was to form the basis of discussion, and another presented by the United States. The French "B" draft was brief, and contained eleven comparatively short articles. *It contained no adjudication clause.* The United States draft, on the other hand, contained apart from certain clauses dealing the conduct of the Mandate in relation to the peoples of the Mandated territory, a number of clauses which provided in considerable detail for rights to be accorded to States Members of the League, and their subjects or nationals, in respect of a number of different matters. This United States draft contained an adjudication clause, and it is clear from the record—and this is what we draw attention to—that the discussion on this adjudica-

[1] *Conférence de la Paix 1919-1920; Recueil des Actes de la Conférence, Partie VI,* Paris 1934, at page 327.

tion clause, appearing in the United States draft only, centred round these detailed rights to be accorded to Members of the League and their nationals under that draft. The adjudication clause read as follows:

> "If any dispute should arise between the Members of the League of Nations regarding the interpretation or application of the present Convention and the dispute cannot be settled by negotiation, it will be referred to the Permanent Court of Justice...
>
> The subjects or citizens of the States Members of the League of Nations may *also* refer claims relating to breaches of *their* rights conferred upon *them* by Articles 5, 6, 7, 7a and 7b of the Mandate to the Court for decision. The judgment given by the Court will be without appeal in the *two* above mentioned cases and will have the same effect as an *arbitral award* rendered pursuant to *Article 13* of the Covenant." (Italics ours.)

The articles of the United States "B" draft, as above indicated provided for what may conveniently be described as an "open door" to carry on trade and commerce, etc., accorded to subjects and nationals of States Members of the League (Article 5); religious freedom, and provision for missionaries (Article 6); equality of opportunity for the commerce and navigation for all States, Members of the League and provision against discrimination between subjects and nationals of State Members of the League (Article 7); concessions in respect of railways, post offices, telegraphs, radio stations and other public works or services without distinction, etc., between subjects or nationals of States, Members of the League (Article 7 *a*); and a kind of most-favoured-nation provision in favour of States, Members of the League (Article 7 *b*) and their nationals.

These clauses thus provided for a series of rights to be conferred both upon States, Members of the League, and upon their subjects and citizens. The wording of the adjudication clause itself was somewhat peculiar and not very good. The second paragraph appeared to confer some kind of direct right of action on the nationals of the Members States—an idea which did not last. Looking at the clause as a whole, and at the words we have italicized in it, and considering the context in which it was proposed and discussed, it appears clear that the first paragraph of it was intended to relate to the rights and interests of the Member States under the Mandate, and the second to those of their nationals under certain specified articles, some of which covered both rights of nationals as well as State rights.

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

in this context and in no other that the adjudication clause was discussed. The matter progressed on this footing.

At its next meeting on 9 July, the Commission continued its examination of both the French and United States draft "B" Mandates; but the French draft was taken as the basis of discussion, article by article. The first four Articles dealt with the kind of thing that appears in the first four Articles of the Mandate for South West Africa and these were, with certain amendments, provisionally adopted.

The Commission then took up Article 5 of the French 'B' draft. The first paragraph, which was very short, provided for equal rights for citizens of States Members of the League in relation to residence, protection of their persons and property, the acquisition of fixed and movable property and the exercise of their callings, all on the same basis as that accorded to nationals of the Mandatory Power. This was accepted after amendment.

The remaining part of the French clause 5, which—again in brief terms, and in principle only—dealt with equality of commercial opportunity for nationals of State Members of the League, freedom of navigation and transit, and protection against discriminatory duties on merchandise, was examined in conjunction with Article 7 of the United States draft.

The Commission then proceeded to consider whether there would be any advantages in inserting, in this French clause 5, detailed stipulations such as the United States 'B' draft provided. The representative of the United States contended that they were necessary in order to ensure satisfactory execution by the Mandatory. The record then reads:

> "*Lord Robert Cecil (British Empire)* thought that that question was linked with the right of recourse to the International Court. If the right of recourse were to be granted, it would be preferable merely to lay down the principle of equality and leave it to the Court to apply the principle to particular cases. He thought however it would be desirable to replace the words 'commercial equality' (*'égalité commerciale'*)—which appeared in the French draft—by the words 'commercial and industrial equality'. If on the other hand, no right of recourse to the Court was to be given, it would be necessary to elaborate stipulations in detail."

The morning session concluded with this observation. This discussion, we think, shows very clearly that the purpose of the adjudication clause, and the sole context in which it was considered, was the protection of the commercial and other rights of States Members of the League, and those of their nationals, as intended to be conferred on them by the Mandate instruments.

It was in consequence of this discussion that the first matter taken up by the Commission at its afternoon session on the same

day was Article 15 of the United States draft, which contained the adjudication clause above quoted. The Commission proposed to continue its discussion of Article 5 of the French draft, but on the suggestion of the Representative of the United States, agreed first to examine this adjudication clause.

The Representative of France said that he had no objection in principle to resort to an international Court, but he thought that if that procedure were open to private individuals, any sort of administration would become impossible. The President agreed. Recourse to the Court should be the responsibility of a Government. He thought there would certainly be some advantage in transferring from the political to the legal plane *the settlement of questions such as those concerning property rights ("le règlement des questions comme celle du droit de propriété")*, but asked whether Governments should not assume the responsibility for deciding whether a claim should be referred to the Court *(si la réclamation doit être portée devant la Cour)*.

To meet this position, Lord Robert Cecil then proposed that the second paragraph of the adjudication clause should read:

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

This met the various points of view. It was accepted by the Representative of the United States, and was adopted, apparently without further discussion.

The next step was the omission of the last sentence of the United States adjudication clause, namely that which provided that the judgment of the Court in each case should be final and have the same effect as an award under Article 13 of the Covenant. This sentence became superfluous if all claims had to be referred to the Court by *Governments*, whether in respect of their own rights under the Mandates, or of those of their nationals.

The Commission then returned to the examination of the final part of Article 5 of the French 'B' draft, and since it was this draft which was the basis of all further consideration, not the United States draft with its detailed provisions for rights to be accorded to States or their nationals, the reference to "Articles 5, 6, 7, *7 a* and *7 b*" in the adjudication clause was omitted. Article 5 of the French draft was then tentatively approved with some amendments.

The Commission then took up a fresh draft of the "C" Mandates. This draft now contained a new article, the final form of which appears as Article 5 of the Mandate for South West Africa, guaranteeing freedom of worship in the mandated territory, and freedom for missionary activities on the part of nationals of Members of the League. *In this same draft* there appeared, *equally for the first*

time, an adjudication clause in broadly the same terms as were eventually submitted to the Council of the League on December 14, 1920, and adopted by it after amendment in its resolution of December 17, 1920, promulgating the Mandate.

It seems to us therefore that the record could hardly make it plainer than it does that the drafting of what might for convenience be called the national rights clauses of the Mandates, and the drafting of the adjudication clause, went hand in hand, each reacting on the other, and that the adjudication clause was never discussed in the context of the obligations of the Mandatories relative to the peoples of the mandated territories. To borrow the words of Lord Finlay in one of the *Mavrommatis* cases (P.C.I.J. Series A, No. 2, at p. 43) in relation to the Palestine Mandate: "Under these heads [i.e. of the commercial, etc., rights of States and their nationals] there are endless possibilities of dispute between the Mandatory and other Members of the League of Nations, and it was highly necessary that a Tribunal should be provided for the settlement of such disputes".[1] Never at any time during the settlement of the drafts was there the slightest suggestion that the adjudication clause was intended to serve quite a different purpose, namely the policing of the sacred trust.

It is evident that it had no relation to the trust obligations of the Mandatory to the peoples of the territories. It was designed to serve a less lofty purpose. It is quite inconceivable that if Article 7 was of the fundamentally essential character stated by the Court; created as one of the securities for the performance of the Covenant, providing the Court as the final bulwark to secure the performance of the sacred trust, that not one word is to be found in the records which gives support to the Court's view[2].

To sum up, our study of the record confirms the view which we had antecedently and independently formed, on the basis of the language of Article 7, and in the context of the Mandate as a whole. This view is, *first*, that Article 7 must be understood as referring to a dispute in the traditional sense of the term, as it would have been understood in 1920, namely a dispute between

[1] We cite Lord Finlay. We do not cite other juristic authority, but we draw attention to the exactly similar view to our own, expressed as representing the general opinion of international lawyers, by Mr. Feinberg in his Hague Academy course of 1937, quoted in full in the Dissenting Opinion of the President of the Court in the present case.

[2] The degree of importance which the United States in 1920 placed upon the equality of commercial and industrial opportunity in the mandated territories is to be seen in the correspondence which passed between it and the Council of the League and the British Secretary of State for Foreign Affairs between November 1920 and March 1921. Annexes 154 and 154*a*, *b*, and *c*, Minutes 12th Session Council of League.

the actual parties before the Court about their own interests, in which they appear as representing themselves and not some other entity or interest; and *secondly*, that Article 7 in the general context and scheme of the Mandate, was intended to enable the Members of the League to protect their own rights and those of their nationals, and not to enable them to intervene in matters affecting solely the conduct of the Mandate in relation to the peoples of the mandated territory.

In this last connection we consider that the record completely confirms the view we have taken in rejecting the argument that Article 7 was introduced, and was essential, in order to compensate for the fact that, by reason of Article 34 of the Statute of the Court (which incidentally had not been drafted in 1919 when the Mandates Commission held its deliberations), the Council of the League could not appear in contentious proceedings, but could only request advisory opinions, and could not therefore, in the last resort, obtain any binding decision against the Mandatory. We have expressed the view that it was foreign to the climate of opinion of 1919-20 to insert an adjudication provision with such a purpose in mind, and the record confirms this. It was not to enable Members of the League to assist the Council in upholding the Mandate that Article 7 was introduced, but to enable them to protect their own national rights which the Council would have no special interest in doing.

A further point, confirming the same view, is that the key provision as regards the interests of the peoples of the mandated territory, which appears in the "C" Mandates (Article 2) as an obligation for the Mandatory to promote to the utmost the peoples' material and moral well-being and social progress, and in a somewhat different form in the "B" Mandates, does not figure in the "A" Mandates at all. Yet an adjudication clause similar to Article 7 does figure there—evidently because the "A" Mandates contained (as they did) provisions concerning the rights and interests of Members of the League and their nationals in the mandated territory and for no other reason.

* * *

There is only one further point we need deal with under this head, namely the argument sought to be drawn from the existence of what is known as the "Tanganyika Clause".

As has been seen, in the course of the drafting, the original division of the adjudication clause into two parts (State rights; rights of nationals) was eliminated, because once it had been agreed that all proceedings of whatever character must be brought by *governments*, whether on their own behalf or that of their nationals, the *raison d'être* for this division disappeared. In only one Mandate

was it unaccountably preserved, that for British East Africa, the adjudication clause of which has a first paragraph in Article 7 terms, and a second providing that Members of the League could *also* bring before the Court complaints on behalf of their nationals[1]. From this it has been sought to draw the conclusion that the first paragraph of the Tanganyika clause (and hence any provision such as Article 7 having similar terms to this first paragraph) must have related to disputes about the conduct of the Mandate.

Even as a matter of interpretation pure and simple, we regard this as too slender a foundation on which to seek to erect such a conclusion. The second part of the clause is quite redundant, as the *Mavrommatis* case bears witness. Moreover the Belgian Mandate for East Africa was on all fours with that of the British Mandate for Tanganyika. It would be quite absurd to suggest that the second paragraph was designed to create a difference between the one Mandate and the other. No reason has ever been advanced why this should have been so. In any case the record shows that all that happened was that the Tanganyika clause simply retained the original form of the adjudication clause introduced and discussed in connection with the statal rights of Members of the League, and rights reserved for their nationals, and that in this form the first part was intended to cover the statal rights of the Members, and the second the rights of their nationals. All that happened in the Tanganyika case was that these two parts were never merged, as happened in all the other cases; or rather that there was simply a failure to drop the second part, as being superfluous. From this, no useful information as to the meaning of the first part can be derived. In the circumstances, therefore, no deduction contrary to the view we hold can legitimately be drawn.

* * *

Conclusion: we consider that the third preliminary objection is good and should be upheld.

VII

FOURTH PRELIMINARY OBJECTION

Having regard to our view, stated under the preceding head, that the matters involved by the present Application are not of a kind

[1] The reason for the failure to draft the Tanganyika clause in the same form as the others has not been established with any certainty. It was one of those drafting quirks that constantly occur at international conferences, and probably arose from differences of view as to whether, if a clause is superfluous, it is better to omit it or, *ex abundanti cautela*, to let it remain.

that are capable of settlement on the basis of a negotiation between the Applicants and the Respondent State, since these parties lack competence to settle such matters by a negotiation purely between themselves, the question of whether the present dispute is one that "cannot" be settled by negotiation hardly arises for us. We will consider it nevertheless, because certain points of principle are involved which seem to us important.

The Respondent has not denied that discussions have taken place in the United Nations, but has confined itself to contending that they did not take place in conditions that gave them any real chance of success, so that it cannot be said that the dispute is one that under no circumstances could be settled by negotiation.

This contention involves questions of fact into which we do not propose to go because, in our opinion, there has not, properly speaking, been *any negotiation at all* in this case of the kind contemplated by Article 7.

Under Article 7, the dispute that cannot be settled by negotiation must be the dispute between the Mandatory and the other Member of the League concerned, i.e., the actual dispute between the Parties to the proceedings before the Court, as such. This means that the negotiation required by Article 7 must relate to that dispute and no other. Now the Applications in this case were filed in November, 1960, and it is quite clear therefore that, up to that date, the Assembly proceedings on which the Applicants rely (even if they can be called negotiation at all) had nothing whatever to do with the actual dispute between the Applicant States and the Respondent State, since this dispute did not then exist *as such* [1]. All that existed up to that date was a disagreement between the Assembly (as an entity) and one of its Members—the Respondent State; and all that had taken place up to that date were sundry proceedings in the Assembly and its Committees, in which indeed the Applicants participated, but simply as Members of the Assembly. To attribute to these antecedent discussions the character of a negotiation *relative to the present dispute* (which only arose in November 1960, if even then[1])—a negotiation conducted by the Applicants in and through the Assembly, or by the Assembly itself on behalf of the Applicants, seems to us wholly unrealistic.

We would not wish to exaggerate the extent of negotiation that may be required to establish that there has been the minimum

[1] Nor strictly does it exist now, since, as we pointed out under the preceding head, it cannot have been created merely by the institution of proceedings; and no other interchanges, outside the Assembly, or directly between the parties as such, have ever taken place.

necessary in the circumstances to make it clear that the parties cannot settle their dispute. But *some* negotiation must, we think, in fact have taken place between the actual Parties to the proceedings before the Court, in their capacity as individual *States*.

Furthermore, the negotiation must relate to the dispute (and no other) alleged to exist between the parties to the proceedings before the Court, which dispute must have existed antecedently to those proceedings. It is not sufficient for the negotiation (supposing it to have been one) to have related to a dispute which, *at the time when this "negotiation" was taking place*, did not exist specifically between the Parties before the Court, but consisted merely in a general all-round controversy pursued on the floor of an international Assembly.

We are not concerned to deny the propriety or utility of discussions in an international forum such as the Assembly of the United Nations. We do not think that, normally, such discussions can be regarded as an actual negotiation taking place between the Parties before the Court, as we think Article 7 contemplated. Such discussions are, and necessarily must be, of too general and diffused a character to constitute a negotiation between the specific parties who eventually come before the Court in relation to a specific dispute between them as States.

Be that as it may, what is clearly apparent to us is that a "negotiation" *confined* to the floor of an international Assembly, consisting of allegations of Members, resolutions of the Assembly and actions taken by the assembly pursuant thereto, denial of allegations, refusal to comply with resolutions or to respond to action taken thereunder, cannot be enough to justify the Court in holding that the dispute "cannot" be settled by negotiation, when no direct diplomatic interchanges have ever taken place between the parties, and therefore no attempt at settlement has been made at the statal and diplomatic level. Since direct negotiations between the actual Parties to a dispute constitute the usual and normally indispensable method of attempting a settlement, we do not see how the Court can hold *and adjudge* that the dispute (that *any* dispute) "cannot" be settled, when no recourse at all has been had to this method. We do not think it should be assumed or postulated that interchanges which have not succeeded in the Assembly or its subsidiary organs, might not, in different conditions, and amongst a restricted number of parties, stand some chance of success—at least a sufficient chance to make it not reasonably possible to affirm the contrary until this method has been attempted. Whether success would be achieved, must be a matter of opinion, but that is not the point; and to us, the failure to conduct, or even attempt, any direct negotiations between the parties to the present dispute in their capacity as such, appears (having regard to the terms of Article 7) to constitute a formal bar to the present proceedings.

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In our opinion the fourth preliminary objection must accordingly be upheld.

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We shall conclude by pointing out that requirements about "disputes" and "negotiations" are not mere technicalities. They appear in one form or another in virtually every adjudication clause that has ever been drafted, and for good reason. They are inserted purposely to protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious. Without this measure of protection, countries would not sign clauses providing for compulsory adjudication. This is an aspect of the matter to which we feel insufficient attention has been given.

* * *

Our final conclusion on the whole case is that, for all of the reasons stated, and in relation to each of the objections raised, whether on the grounds actually advanced by the Respondent State or on other grounds, the Court is not competent in this case, and should refuse to assume jurisdiction.

(Signed) Percy C. SPENDER.

(Signed) G. G. FITZMAURICE.