DISSENTING OPINION OF JUDGE VAN WYK

The jurisdiction of this Court is provided for in Articles 36 and 37 of its Statute. It is common cause that paragraphs 2-5 of Article 36 do not apply in this case, and it is therefore only necessary to refer to the first paragraph of Article 36, which reads as follows:

> "1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

This is not a case which has been referred to this Court by the parties, nor is it a matter specially provided for in the Charter. Article 37 provides *inter alia* that whenever a treaty or convention in force provides for reference of a matter to the Permanent Court of International Justice, the matter shall be referred to this Court. The legal effect of these provisions is that this Court has no jurisdiction in the present matter unless there exists a treaty or convention in force which specially provides for reference of this matter to this Court or the Permanent Court of International Justice.

From the above it is clear—indeed, it is common cause—that the jurisdiction of this Court depends upon consent (see *Case concerning the Factory at Chorzów*, P.C.I.J., Series A, No. 9, 26 July 1927, p. 32, and Rosenne's *International Court of Justice*, 1957, pp. 260, 318-320), and in this case such consent must be embodied in a treaty or convention in force. Consent to jurisdiction cannot be presumed (see *Aerial Incident of 27 July 1955, I.C.J. 1959*, p. 142). Sir H. Lauterpacht, in *The Development of International Law by the International Court*, 1958, page 91, states the rule as follows:

> "The Court ... has emphasized repeatedly the necessity for extreme caution in assuming jurisdiction, which must be proved up to the hilt. Numerous Judgments show the Court as 'bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the Respondent and only exists in so far as this consent has been given'. Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it."

See also Manley O. Hudson in *The Permanent Court of International Justice*, 1920-1942, page 660.

The Applicants claim that this Court has jurisdiction to determine the issues raised in their Applications and Memorials by virtue of

the provisions of Article 7 of the Mandate Declaration for South West Africa read with Article 22 of the Covenant of the League of Nations, and Article 37 of the Statute of this Court and Article 80 (1) of the Charter of the United Nations. This means that the Applicants contend that the aforesaid provisions constitute terms of treaties or conventions in force which embody the consent of the Respondent to the present matter being submitted to this Court by the Applicants.

It is therefore necessary to determine the meaning and legal effect of Article 7 of the Mandate Declaration as read with Article 22 of the Covenant of the League of Nations, as well as the meaning and legal effect of the aforesaid provisions of the Statute of this Court and the Charter of the United Nations. This must be done in accordance with the principles of construction, as applicable in international law in terms of Article 38 of the Statute of this Court, which reads as follows:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> *(b)* international custom, as evidence of a general practice accepted as law;
>
> *(c)* the general principles of law recognized by civilized nations;
>
> *(d)* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

Article 59, referred to in Article 38 *(d)*, provides that a decision of this Court has no binding force except between the parties and in respect of that particular case. It follows that "judicial decisions" mentioned in Article 38 *(d)* include the decisions of this Court. There are no parties to Opinions of this Court and in terms of Article 59 such opinions have no binding force. It follows that Opinions of this Court, even if they relate to the same legal issues now being considered, cannot be more than a subsidiary means for the determination of the rules of international law. The general principles of law recognized by civilized nations must always prevail where those principles are in conflict with any views stated in previous decisions of this Court.

There can be no doubt that all contracts, including treaties and conventions that operate in international law, owe their effect in law to the common consent of the parties thereto:

Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15; at p. 21:

"It is well established that in its treaty relations a State cannot be bound without its consent... It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses."

Page 26:

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

Pages 31-32, per Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo:

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

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

For this reason, there exists the universally accepted basic principle applicable in the interpretation of all contracts, including treaties, conventions, and other international agreements that one should endeavour to arrive at the true common intention of the parties relative to the agreement in question as it existed at the time agreement was reached.

This rule appears to be self-evident and is common cause but, as it is of such crucial importance in this matter it merits detailed consideration.

The rule in the United Kingdom is stated in *Chitty on Contracts, 22nd Edition (1961)* at page 583, as follows:

"The object of all construction of the terms of a written agreement is to discover therefrom the intention of the parties to the agreement."

Article 1156 of the French *Code Civil* provides:

"On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."

Similar rules apply in every legal system that I have been able to refer to, e.g., *Belgium, Code Civil* Art. 1156; *The Netherlands, Burgerlijk Wetboek* Art. 1379; *Italy,* Code Art. 1362; *Germany,*

Bürgerliches Gesetzbuch Art. 133; *Switzerland, Code of Obligations* Art. 18; *Greece*, Code Art. 173; *Hungary*, Code Art. 265; *Spain*, Code Art. 1259; *Poland*, Code Art. 108; *Egypt, Code Civil Mixte* Art. 199; and *Code Civil Indigène* Art. 138; *Brazil*, Code Art. 85; *Chile*, Code Art. 1560. There is abundant authority that the same rule applies in international law:

"*Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266"; per Judge Read at p. 320:

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

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

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

Ralston, J. H. *The Law and Procedure of International Tribunals*, Revised Edition (Stanford: Stanford University Press, 1926), p. 27:

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

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

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

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

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

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

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

Fitzmaurice, G. G. "The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points", *The British Year Book of International Law*, Vol. XXXIII (1957), pp. 203-293, at p. 204:

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

Through the ages lawyers have evolved auxiliary rules of construction to assist in the determination of the common intention of the parties to an agreement, and as these rules are based on logic, common sense and long experience, it is not surprising that they are substantially the same in almost all civilized States. It is also, therefore, not surprising that international tribunals have adopted them without any significant changes. The purpose of these rules is to assist the Court in the evaluation of the admissible evidence —including of course the instruments in question themselves—relating to the intention of the parties. Inasmuch as evidence which is logically relevant in an enquiry as to the intention of the parties to an agreement is sometimes excluded by the operation of rules of law, e.g. the rule of estoppel, a conclusion based on the admissible evidence may sometimes lead to somewhat artificial results. Thus a party who has signed an instrument which records his assent to the agreement recorded therein is deemed to have agreed to its terms, and cannot be heard to say that he negligently signed the instrument without reading it or without studying it properly. These considerations, however, can never afford a valid excuse for not determining the intention of the parties, as far as is reasonably possible.

One must also bear in mind that parties frequently deliberately use wide terms so as to provide for all possible situations, foreseen and unforeseen, and it follows that when a situation not foreseen by the parties arises which falls within the meaning of the words employed by them they are deemed to have had a common intention in regard thereto.

The auxiliary rules of construction are *prima facie* pointers to the probable intention of the parties. One must always bear in mind that their sole function is to aid the Court in its task of determining the true common intention of the parties. Lord McNair aptly remarks, in *The Law of Treaties 1961*, page 366, as follows:

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

Rights originating from a contract may be divided, *inter alia*, into personal rights and real rights but, whether personal or real, such rights can never embrace anything not included in the common intention of the parties. A treaty or convention may create an international institution or it may define the status of a territory but its meaning and effect depend primarily on the intention of the parties thereto. The rule may therefore be stated to be that the existence, the measure, and the meaning of treaty rights and obligations are determined in accordance with the common intention of the parties to the instrument in question and, in determining this common intention, the Court invokes the aid of the accepted rules of construction. In *Certain Expenses of the United Nations* (Opinion of 20 July 1962, p. 157) the following appears:

> "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty."

These rules will be applied in the interpretation of the Covenant of the League of Nations, the Mandate Declaration for South West Africa and the Charter of the United Nations; and it is convenient to deal with the more important rules at this stage.

Inasmuch as the aim of the parties to a written instrument is to set forth their agreement in written language which renders their own intention clear to themselves and to others, it follows that the most effective method of arriving at this common intention, when called upon to construe a written agreement, is to find it in the ordinary, normal, natural, and unrestrained meaning of the words

in the instrument in the context in which they appear. See Halsbury's *Laws of England*, 3rd Edition, Volume 11, page 632; Cheshire and Fifoot *Law of Contracts*, 5th Edition, page 1056.

The rule with regard to statutes is the same—see Maxwell on *Interpretation of Statutes*, 11th Edition, page 3. Where the words of an instrument in their context make sense, there should be no reason for doubting that they express the common intention of the parties and the need for interpretation does not really arise.

A similar rule has been applied by this Court, and by its predecessor:

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

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

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

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39):
>
> 'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'
>
> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."

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

Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 226, at p. 279,

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

Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952, p. 93; at p. 104.

Where it appears from the context that words were not intended to be used in their ordinary sense, such words should be construed in harmony with the context. See Halsbury's *Laws of England,* 3rd Edition, Vol. 11, pages 388-389. The intention of the parties should, therefore, be gathered from the instrument as a whole rather than from any particular words they may have used.

From the above it follows that where words or terms of an instrument are capable of two meanings the object with which they were inserted, as revealed by the instrument or any other admissible evidence, may be taken into consideration in order to arrive at the sense in which they were used and where one interpretation is consistent with what appears to have been the intention of the parties and another repugnant to it, the Court will give effect to this apparent intention. The Court will always prefer an interpretation which renders an agreement valid and effective to an interpretation which renders it void and ineffective, provided the former can fairly be said not to be inconsistent with the intention of the parties. This principle is stated in the rule *Ut res magis valeat quam pereat, vide* Halsbury's *Laws of England,* 3rd Edition, Vol. 11, page 391; *Craies on Contracts, General Principles,* 21st Edition, page 152; *Burgerlijk Wetboek,* Article 1380; *Italian Code,* Article 1357; *French Code Civil,* Article 1157. The rule in the United States is stated as follows in *Williston on Contracts,* Revised Edition, Rev. 8, Vol. 3, Section 620:

> "*Secondary Rules: The writing will be interpreted if possible so that it shall be effective and reasonable.* An interpretation which makes the contract or agreement lawful will be preferred over one which would make it unlawful; an interpretation which renders the contract or agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless; an interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results... But the mere fact that parties have made an improvident bargain will not lead a court to make unnatural implications or artificial interpretations. A court will not under the guise of interpretation write a new contract for the parties."

This principle was recognized by the Permanent Court of International Justice in the case of *Chorzów,* Series A, No. 9, page 24:

"Account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision. The Geneva Convention provides numerous means of redress to secure the observation of its clauses and it does so in ways varying according to the subjects dealt with under the different Heads, Parts or other subdivisions of the Convention. Article 23 contains provisions of this kind in so far as concerns Articles 6 to 22 which form the greater portion of Head III of the First Part."

See also *Corfu Channel case, Judgment of April 9, 1949, I.C.J. Reports 1949*, page 4, at page 24, and *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports, 1949*, page 174, at 179 and 183. In *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, the following appears:

Page 229:

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

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

The ineffectiveness in the present case of the clauses dealing with the settlement of disputes does not permit such a generalization."

Pages 229-230:

"... Normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligation. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the treaties have made no provision."

In the *Anglo-Iranian Oil Co.* case it was stated:

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

Lord McNair in *The Law of Treaties* (1961), page 383, deals with the rule as follows:

"The rule of effectiveness must mean something more than the duty of a tribunal to give *effect* to a treaty; that is the obvious and

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

From the above it is clear that the rule of effectiveness only applies where a provision is obscure. It does not permit the departure from the terms of an instrument and, save where a term is implied in accordance with principles to be stated *infra,* it does not permit one to read into a treaty stipulations for which no express provision was made in the text itself.

As the object of interpretation is to arrive at the intention which existed when the agreement was recorded, it follows that words or phrases must be given that meaning which they bore at the time when the instrument in question was executed. In the *Minquiers and Écréhous case, Judgment of November 17th, 1953: I.C.J. Reports 1953,* page 91, Judge Carneiro remarked:

"I do not regard the Treaty of Paris as a treaty of frontiers. To do so would be to fall into the very error which we have been warned against: an instrument must not be appraised in the light of concepts which are not contemporaneous with it."

The next question to be considered is to what extent extrinsic evidence is admissible to assist in the determination of the intention of the parties relative to an agreement which has been recorded in writing. Evidence of surrounding circumstances to identify the parties or the subject-matter of a contract is clearly admissible (*vide* Phipson, pages 637-638).

As regards other extrinsic evidence, however, the general rule is that an instrument must be interpreted as it stands. The result is that this Court will not have regard either to preparatory work which has preceded a written instrument nor to the subsequent conduct of the parties if a text in itself is clear. Where there is obscurity, the Court will have regard to extrinsic evidence which may assist it in determining the intention of the parties and, in such a case, it will have regard to the preparatory work as well as to the subsequent conduct of the parties. In the *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948,* this Court remarked:

"The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according

to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself."

See also *Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, p. 4; at page 8, and *Ambatielos case (first phase), I.C.J. Reports 1952*, p. 28, at p. 45.

It would appear that it is not the practice of this Court to order the excision from the record of any evidence of preparatory work which it may consider to be inadmissible. Such evidence is either not referred to, or merely relied upon to confirm a conclusion arrived at without it. See in this regard Hudson, *The Permanent Court of International Justice 1920-1942*, page 660, and Hogg, *Minnesota Law Review*, Vol. 44, No. 1, November 1949, pages 28-35.

It seems that where the *travaux préparatoires* are before the Court there should be no objection to its holding that the words of a particular provision are clear and unambiguous, and, in the alternative, that even if the words should not be held to be clear and unambiguous, the *travaux préparatoires* confirm the Court's construction.

Evidence of interpretation placed upon written instruments by the parties subsequent to their execution is only admissible in case of obscurity. In his *Law of Treaties*, page 21, Lord McNair remarks:

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

In terms of the general rules stated in *Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, page 8, quoted above, such evidence cannot be admitted to contradict clear and unambiguous provisions. The rule was stated as follows in the *Case concerning the payment in gold of Brazilian Federal Loans contracted in France: P.C.I.J. Ser. A, Nos. 20-21, Judgment No. 15*, page 119:

"It is sought to apply the familiar principle that where a contract is ambiguous, resort may be had to the manner of performance in order to ascertain the intention of the parties."

In *Certain Expenses of the United Nations*, page 189, Sir Percy Spender remarked:

"In any case subsequent conduct may only provide a criterion of interpretation when the text is obscure, and even then it is

necessary to consider whether that conduct itself permits of only one inference (*Brazilian Loans Case,* P.C.I.J., Series A/B, Nos. 20/21, p. 119). Except in the case where a party is by its conduct precluded from relying upon a particular interpretation, with which type of case we are not presently concerned, it can hardly control the language or provide a criterion of interpretation of a text which is not obscure."

See also the *Case concerning the payment of various Serbian Loans issued in France, P.C.I.J. Reports, Ser. A, Nos. 20-22,* p. 58; the *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949,* p. 25, and the *Asylum case: I.C.J. Reports 1953,* pp. 323-324.

The above major principles of interpretation, as applied by this Court up to 1951, were summarized by Sir G. G. Fitzmaurice in the *British Year Book of International Law* 1951, XXVIII, p. 9; and in the *British Year Book of International Law* 1957, XXXIII, p. 33, he reformulated these principles in the light of the Court's work during the period 1951-1954 as follows:

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

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

II. *Principle of the Natural and Ordinary Meaning*

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

III. *Principle of Integration*

Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.

Subject to the foregoing Principles:

IV. *Principle of Effectiveness (ut res magis valeat quam pereat)*

Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.

V. *Principle of Subsequent Practice*

In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.

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

To the above principles may now be added, on the basis of certain pronouncements made in the 1951-1954 period, a sixth major principle, as follows:

"VI. *Principle of Contemporaneity*

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

An agreement may be held subject to an implied or unexpressed term where there arises from the agreement itself and the circumstances under which it was entered into, an inference that the parties must have intended something which they omitted to record. In this regard the object the parties sought to achieve may be of importance. One must however bear in mind that the object which the parties intended to achieve must itself be determined by interpretation. It must also be emphasized that the major principle of interpretation is that the intention of the parties must be found in the meaning of the words actually used and courts in all legal systems guard themselves against assenting to a proposed implication on any but the most cogent grounds. For this purpose, safeguards have been laid down to avoid assumptions of a higher degree of effectiveness than is inherent in the intention conveyed by the express terms employed by the parties, read in the light of the surrounding circumstances. *Pollak on Contracts*, 12th Edition, page 195, remarks as follows:

"Interpretation has to deal not with conjectured but with manifest intent and a supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded."

In Cheshire and Fifoot *Law of Contract*, 3rd Edition, page 129, the following appears in regard to implied terms:

"The convenience of the doctrine is manifest, and it has often received the doubtful compliment of citation by counsel as a last desperate expedient in a difficult case. The Courts, however, have

recognized the danger of undue elasticity, and have circumscribed its limits. Based upon the presumed intention of the parties, it may not contradict or vary the express terms of the agreement. Nor can it be used simply to render the contract rather more attractive in the eyes of reasonable men. It is for the parties, not for the judges, to determine the nature of their liabilities. The doctrine can be invoked only if an obligation, clearly intended as such, must fail to take effect unless some obvious oversight is remedied; and, even so, the judges will supply the minimum necessary to save the contract from shipwreck. The test to be applied by the Court in deciding whether to make the implication has been stated by several judges in much the same language.

> 'A term can only be implied', said Scrutton, L. J., 'if it is necessary in the business sense to give efficacy to the contract, i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties: 'What will happen in such a case?' they would both have replied: 'Of course so and so will happen; we did not trouble to say that; it is too clear.' "

In *K. C. Sethi v. Partab Mull Rameshewar of England, Law Reports 1950*, Vol. 1, page 51, at page 59, Jenkins, L. J. remarked:

> "One thing I think is clear about implied terms. I do not think that the Court will read a term into a contract unless, considering the matter from the point of view of business efficacy, it is clear beyond a peradventure that both parties intended a given term to operate although they did not include it in so many words."

See also *Craies on Statute Law*, 5th Edition, page 103.

Lord McNair states the rule as follows in his *Law of Treaties*, page 436:

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

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

> "The purposes and objects of this Convention were stated in its Preamble in the following words: 'the necessity of establishing, on

fixed and uniform bases, the exercise of the right of protection in Morocco and of settling certain questions connected therewith...'. In these circumstances, the Court cannot adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention. The Court, in its Opinion—Interpretation of Peace Treaties (Second Phase) (*I.C.J. Reports 1950*, p. 229)—stated: 'It is the duty of the Court to interpret the Treaties, not to revise them'."

Page 198:

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

Page 199:

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

See also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, Tirage Spécial*, p. 13, and "The Law and Procedure of the International Court of Justice: Treaty Interpretation and certain other Treaty Points", *The British Year Book of International Law*, Vol. XXVIII (1951), pp. 1-28; at p. 9.

The object and purpose of the parties to an instrument may be of considerable importance where one has to choose between alternative possible meanings of an ambiguous text, or where the issue is whether an inference of tacit agreement does or does not arise necessarily in a particular respect. As already pointed out,

however, the basic object of interpretation is to arrive at the common intention of the parties and it must always be borne in mind that the principle of effectiveness only applies as an aid towards ascertainment of common intention. It cannot supplement absence of agreement or override the clear natural meaning of a text or other cogent indications of common intent. At page 383 of the *Law of Treaties* 1961, Lord McNair remarks:

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

It is clear from what has been stated above that this Court cannot adopt a construction by implication which is not necessary (*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174; at pp. 182, 184, 198), or which would go beyond the scope of the declared purpose and object of the contract or would involve radical changes or additions (*Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, at page 196, 199), or which would do violence to the clear and unambiguous express provisions of the instrument (*Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, p. 4; at p. 8).

It must be clear that had the suggested term been raised at the time the parties would have agreed thereto. Hogg, *op. cit.*, pp. 59-60, remarks:

> "A vague showing of general intent will not be sufficient to cover a case where the parties fail to provide for a particular contingency against which they could have made provision had they adverted to the problem."

It is clear that this Court has no power to insert a term in a treaty which it considers a party should have inserted.

If it is clear beyond peradventure that the parties to an instrument must have intended an unexpressed term to operate, one should have no difficulty in drafting such a term with clarity and precision. If, however, after a careful study of the instrument, the surrounding circumstances and other admissible evidence, difficulty and doubt is experienced in the phrasing of a suggested

implied term, it is clearly not reasonable to impute to the parties the intention to contract on the basis of such a term; *vide Rapp Maiester* v. *Raonovsky 1943, WLD 68*, at pages 74-75. Where, in addition, the admissible facts reveal that one of the parties would probably not have agreed to such a term had it been raised, there is obviously no justification for such an inference. Similarly, where the subsequent conduct of the parties reveals that no such tacit intention existed, there is no room for any inference that the parties intended to agree on the basis of such a term.

The rules of construction authorize what has been termed the "teleological approach" only to the limited extent indicated above. This approach, in its more extreme form, assumes that this Court has the power to disregard or amend the terms of an instrument in order to achieve an object, or presumed object, albeit in a manner different from that provided for and intended by the parties; but this approach disregards the basic rule that the purpose of construction is to determine the common intention of the parties and, in any event, it has not been recognized by this Court or its predecessor. No court has the power to make a party's obligations different from, or more onerous than, what it has agreed to. If this Court has the power to disregard or to amend the provisions of a treaty or convention, it has legislative powers and such powers have not been entrusted to it by its Statute or any of the sources of international law referred to in Article 38 of its Statute. As Sir Gerald Fitzmaurice rightly remarks in the article in the *British Year Book of International Law* 1957, XXXIII, quoted above at page 208:

> "The Court has shown plainly that, in its view, the performance of such a function cannot properly form part of the interpretative process."

In the *Peace Treaties* case, *I.C.J. Reports 1950*, page 221, at page 229, this Court remarked:

> "It is the duty of the Court to interpret the treaties, not to revise them."

Rosenne, *The International Court of Justice*, p. 63, remarks, *inter alia*, in regard to this Court:

> "Thus, being a Court of law it has the duty in relation to international treaties to interpret them and not to revise them, and it would exceed its judicial functions were it to revise them on the pretext of remedying a default, for the occurrence of which the treaty in question has made no provision, or where its conclusions involve radical changes and additions to the provisions of the convention. The Court will so act even if the consequences may not appear to be entirely satisfactory."

Before dealing with the provisions of the Covenant and the Mandate Declaration, I shall briefly set out the relevant history preceding the Covenant and the Mandate Declaration.

German South West Africa was surrendered to the Respondent's Military Forces in July 1915 and Respondent remained in military occupation for the remainder of the War and thereafter, pending the Peace Settlement. Similarly, the former German colony in New Guinea was occupied by Australia, Samoa by New Zealand, the German islands in the Pacific Ocean, north of the Equator, by Japan and the various German territories elsewhere in Africa by Great Britain, Belgium and France.

Agreements were concluded during the War between some of the Principal Allies and in terms thereof their respective claims to the various occupied German territories were to be recognized in the event of an Allied victory. In March 1917 the British Imperial War Cabinet decided that the Respondent should be allowed to annex German South West Africa, that Australia and New Zealand should be allowed to annex German New Guinea and German Samoa respectively. President Wilson of the United States was strongly opposed to annexation of former enemy territories, and at the Peace Conference he insisted at the outset that the Covenant of the League of Nations should provide for complete authority and control of these former German territories by the League, who could at its discretion delegate its powers, organize its agency to act "as its agent or Mandatory".

General Smuts in a booklet, *The League of Nations, a Practical Suggestion*, published in 1918, proposed a mandate system for territories formerly belonging to Russia, Austria, Hungary and Turkey, but he felt that such a system could not be applied to the "German colonies in the Pacific and Africa".

The future of the German colonies was discussed during January 1919 in the so-called Council of Ten, which consisted of the Heads of Government and Foreign Ministers of the United States of America, the United Kingdom, France, Italy and Japan. Representatives of New Zealand, Australia and South Africa attended and pressed their cases for incorporation of the respective territories allocated to them in terms of the aforesaid decision of the British Imperial War Cabinet. They were supported by the British Prime Minister and the representative of France, who also advocated annexation of the occupied territories. A deadlock resulted, but eventually a compromise was effected, from which Article 22 of the Covenant of the League of Nations ultimately emerged. The fact that this Article is the product of compromise explains its somewhat non-legal terminology. That it was the result of compromise clearly appears from the following extract from *Foreign Relations of the United States, Paris Peace Conference 1919*, Volume 3, page 785:

"Mr. Lloyd George said that he had circulated a document ... to each of the representatives of the Great Powers. That document did not represent the real views of the colonies but it had been accepted by them in an attempt at a compromise."

The provisions of this document became, with certain amendments, Article 22 of the Covenant. The only important addition is paragraph 9 of Article 22, which provides for a Permanent Mandates Commission.

Article 22 reads as follows:

"(1) To those colonies and territories which as a 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 civilization and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

(3) The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

(5) Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

(6) There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under

the laws of the Mandatory as integral portions of its territory, subject to the safeguards abovementioned in the interests of the indigenous population.

(7) In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

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

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

In terms of Article 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions. These possessions included, *inter alia*, German South West Africa, German colony New Guinea and German Samoa.

After Article 22 of the Covenant of the League of Nations had been agreed upon at the Peace Conference, at least two separate events, in addition to the ratification of the Treaty, had to take place before the Mandate institution for South West Africa could come into operation, namely: (1) the Principal Allied and Associated Powers had to entrust, in terms of paragraph 2 of Article 22, the tutelage of the peoples of South West Africa to a qualified State; and (2) either the Members of the League had to agree upon the degree of authority, control or administration to be exercised by the Mandatory, or such degree of authority, control or administration had to be explicitly defined by the Council in terms of Article 22 (8) of the Covenant of the League. The Covenant of the League was ratified and came into force on 10 January 1920. The Principal Allied and Associated Powers had already decided before this date that Respondent would hold the Mandate for South West Africa. Respondent was at all material times willing to accept such Mandate, held the other necessary qualifications stated in paragraphs 2 and 6 of Article 22, and was therefore a qualified State. Members of the League did not act under the provisions of Article 22, and the Council accordingly defined the degree of authority, control or administration to be exercised by the Respondent on 17 December 1920 in the declaration that is commonly called the Mandate, and it reads as follows:

"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 overseas 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, and may apply the laws of the Union of South 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 true copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany."

During 1919 a Commission of the Supreme Council of the Principal Allied and Associated Powers prepared a draft agreement between the Respondent and the Principal Allied and Associated Powers in terms whereof the Mandate to administer South West Africa was to be conferred upon Respondent. Differences arose between the Principal Allied and Associated Powers in regard to the interpretation of those provisions of Article 22 which dealt with equal opportunities of the trade and commerce of Members of the League, and the matter was not proceeded with. The terms set out in this draft were the same as those set out in paragraphs 2-6 of the Declaration of the Council of the League of 17 December 1920, but the provisions relating to compulsory jurisdiction read as follows:

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

On 5 August 1920 the Council of the League asked the Principal Allied and Associated Powers to name the Powers to whom they had decided to allocate the Mandates, and to communicate to the Council the terms and conditions of the Mandates which they proposed should be adopted by the Council in terms of Article 22. In December 1920 draft Mandates, including one for South West Africa, were submitted to the Council of the League by the Government of the United Kingdom. Thereupon the Council referred these drafts to the Secretariat for consideration and "to consult other legal experts on any points they consider necessary". The wording of the terms in this draft was substantially the same as the draft prepared by the Commission of the Supreme Council of the Principal Allied and Associated Powers in 1919. Thereupon the Council made its declaration of 17 December 1920.

It will be observed that the compromissory clause was amended to read "The Mandatory agrees", etc., instead of "if any dispute ... should arise between Members of the League of Nations". The reason for this change, according to Viscount Ishii, was that the Council had been advised that Members of the League, other than the Mandatory, could not be forced against their will to submit their differences to the Permanent Court of International Justice. Members of the League were clearly not considered to be Parties to any "agreement" embodied in the terms of the Mandate Declaration.

The amendment made by the Council of the League to the draft Mandate Declaration submitted to it is of considerable significance. It reveals that the Council thought that it was responsible for the terms of the Mandate Declaration and that it could amend the terms of the draft submitted to it. The amendment to Article 7 is certainly not of a minor nature. The draft submitted to the Council provided for compulsory jurisdiction relative to disputes between Members of the League. If this provision was retained and agreed to by Members of the League, the Respondent could have brought proceedings against Members of the League, and would not have been obliged to wait for a clarification of legal issues until proceedings were instituted against it. Furthermore, if the draft remained unamended, Members of the League could have brought contentious proceedings against one another relative to the interpretation or application of the provisions of the Mandate. In its original form the compromissory clause in Article 7 approx-

imated a declaration by each Member of the League under the provisions of Article 36 of the Statute of the Permanent Court of International Justice, and complied with the condition of reciprocity provided for therein. In its amended form Article 7 imposes a unilateral obligation on the Mandatory without any reciprocity.

The first issue, namely, whether the Mandate Declaration is a treaty or convention in force, has been fully dealt with in the Judgment of Judge Sir Percy Spender and Judge Sir Gerald Fitzmaurice, and it is sufficient to say that I fully endorse their views that it is not a treaty or convention in force.

The next issue is whether the legal effect of Article 7 of the Mandate Declaration or any amendment thereof is that the Respondent has agreed to an action being instituted against it relative to the interpretation or the application of the provisions of the Mandate by the Applicants. Here again, I am in full agreement with the views of Judge Sir Percy Spender and Judge Sir Gerald Fitzmaurice, but inasmuch as I desire to emphasize certain aspects of this issue, I shall deal therewith fully.

The Applicants contend that they are ex-Members of the League and Members of the United Nations, and that in terms of the compromissory clause in Article 7 of the Mandate Declaration, Article 37 of the Statute of this Court, and Article 80 (1) of the Charter of the United Nations, the Respondent has agreed to such actions being instituted against it by either ex-Members of the League or Members of the United Nations.

I shall first deal with the Mandate Declaration and thereafter with the aforesaid provisions of the Statute of this Court and the Charter of the United Nations.

It will be observed that the Mandatory's substantive obligations are contained in Articles 2-5 of the Mandate Declaration, and the procedural obligations in Articles 6 and 7. Articles 2-5 relate to the administration of the territory. It will also be observed that Articles 6 and 7, as well as that part of Article 5 which provided for the admission of missionaries who are nationals of Members of the League, depended for their fulfilment on the existence of the League of Nations. For the purposes of issues now being considered, the aforesaid provision of Article 5 is not of any importance and will not be dealt with. Article 6 depended for its fulfilment on the existence of the League, as without a League there could not be a Council of the League to report to, and the compromissory clause in Article 7 depended for its fulfilment on the existence of the League, as without a League in existence there could not be a Member of the League.

The ordinary natural meaning of the expression "Member of the League" in Article 7 is a State which is a Member of the League. The Article does not refer to members of international organizations generally. It refers to membership of a particular organization: the League of Nations. There is no reference to non-members, ex-members of the League, or Members of the United Nations. The expression "Member of the League" appears in all but four of the articles of the Covenant. It is used in all the Mandate instruments, not only in the compulsory jurisdiction clauses but also in other clauses where special benefits are reserved for Members of the League. In all these instances it could have been used only as describing Members of the League at the time when the intended privilege was sought to be enjoyed. All these provisions depended for their fulfilment upon the existence of the League.

It is contended that "Member of the League of Nations" in Article 7 does not mean "Member of the League of Nations", but means a State which is or has been a Member of the League of Nations. It is argued that this extraordinary meaning is justified as the natural and ordinary meaning of these words is incompatible with the spirit, purpose and context of the clause in which they appear. Three reasons are advanced for this proposition.

The first is that the judicial protection of the sacred trust of civilization was an essential feature of the Mandates System. The answer is that the Mandate Declaration for South West Africa did not provide for judicial protection or judicial control; but even if it did it cannot be said that this provision was an essential feature of the Mandate. In any event, this reason affords no justification in law or logic for giving the words "Member of the League" a meaning they are not capable of bearing.

Article 22 (1) of the Covenant required the application of the principle that securities for the performance of the sacred trust referred to therein should be embodied in the Covenant. Securities for the protection of the sacred trust were in accordance with this principle embodied in Article 22, but judicial protection or judicial control was not one of these securities. No organ of the League was authorized to add to these securities, which means that securities could only have been added by an amendment of Article 22 in terms of the provisions of Article 26 of the Covenant, and no such amendment has ever been made.

The resolution of the Council which constitutes the Mandate Declaration has not been embodied in the Covenant. There is no legal principle that the executive acts of an executive organ is embodied in the enabling authority. Thus, a ministerial regulation under a statute is not embodied in the statute, nor are the decisions

of a board of directors embodied in the Articles of Association of a Company. If the Mandate Declaration was embodied in the Covenant of the League the provisions relating to the amendment of the Covenant (Article 26 of the Covenant) would have applied thereto; but they do not apply inasmuch as Article 7 of the Mandate Declaration provided specifically that the Mandate could be amended with the consent of the Council.

In any event, the power of the Council was confined to defining the degree of authority, control or administration to be exercised by the Mandatory and did not include any power to add to the securities relating to the supervision over the Mandatory embodied in Article 22. The supervision over the Mandatory was entrusted to the Council of the League and the Mandates Commission and there could not have been any intention to authorize concurrent supervision by the appointment of every Member and ex-Member of the League as individual guardians of the sacred trust or to confer on each of these States the right to institute proceedings against any Mandatory whenever it was considered that a breach or abuse of the Mandate had taken place.

It follows that the compromissory clause in Article 7 of the Mandate Declaration was not intended to impose any obligation other than that the Mandatory was obliged to consent to the submission of disputes relating to the interpretation or application of the Mandate between it and another Member of the League, if such disputes could not be settled by negotiation, to the Permanent Court of International Justice. "Disputes" had no meaning other than its ordinary meaning in compromissory clauses, i.e., disagreements relating to the legal rights of the parties. There clearly could not have been any intention to confer general supervisory rights on every Member or ex-Member of the League.

It has been contended that inasmuch as it was realized that by abusing the unanimity rule which applied to the Council a Mandatory could frustrate the supervision of the Council, and that for this reason it was considered necessary to arm every Member of the League (and every ex-Member of the League) with supervisory powers including the right to institute contentious proceedings against the Mandatory whenever such State thought that the Mandate had been abused or breached.

It was with reluctance that Mandatories such as the Respondent, New Zealand and Australia agreed to the supervision of the League. They obviously only agreed to the supervision by the Mandate Commission and the Council of the League on account of the protection afforded them by the procedural provisions of the Covenant, and the fact that the Council was a small and select body of States. It is not reasonable to *assume* that they would have agreed to additional supervision by every Member and every ex-Member of the League armed with the right to institute legal proceedings

against them whenever it was considered that the Mandate had been breached or abused.

If Article 7 was intended to have this far-reaching effect somebody would have made some reference thereto and it would have been recorded somewhere. It would have been the subject of violent debates. Not one word of evidence to support this theory is to be found in the *travaux préparatoires* or in any contemporary writings or in the subsequent conduct or statements of the parties. The possibility of the failure of the machinery devised in the Covenant was not contemplated at the time. Moreover, the fact that for more than forty years not a single State ever sought to act as an individual supervisory authority in itself effectively refutes the aforesaid contention.

In any event, however important it may have been, the compromissory clause in Article 7 of the Mandate Declaration can in no way be said to have been an indispensable feature of the Mandate. Had it been omitted from the Mandate Declaration a valid Mandate would nonetheless have been constituted in accordance with the provisions of Article 22. The Permanent Court of International Justice would not, and could not, have held that Article 22 of the Covenant contained an implied provision that a compromissory clause was essential. It is significant that the Charter of the United Nations does not provide for the compulsory jurisdiction of any Court in regard to the sacred trust created in Article 73, nor is such a provision contained in Chapters XII and XIII, which deal with the international trusteeship system. There are in fact trusteeship agreements which do not contain any provision for the compulsory jurisdiction of the Court. If the Permanent Court of International Justice came to an end for some reason or other one could not have argued that for that reason the Mandate had come to an end.

The second reason advanced for not giving the words "Member of the League" their ordinary and natural meaning is that "the right to implead the Mandatory Power before the Permanent Court was conferred on the Members of the League because it was regarded as the most reliable and enduring procedure of ensuring the protection of the Court, whatever might happen to or arise from the machinery of administrative supervision". It is difficult to understand this reason but it apparently means that it was considered that the right to bring contentious proceedings should survive the League or the organs of the League. Here again we have a bare assertion unsupported by facts or reasons.

The truth is that the possibility of the dissolution of the League was not contemplated when the Covenant was agreed to or when the Mandate Declaration was made and this consideration could therefore not have constituted a reason for conferring rights on States irrespective of whether they remained Members of the

League or not rather than for as long as they remained Members of the League. If it is true that the authors of the Mandate Declaration actually intended that the words "Members of the League" should not have their ordinary and natural meaning it is difficult to see why more appropriate terminology was not employed; in other words if it was intended that "Member of the League" should not mean Member of the League why were the words "Member of the League" preferred?

The third reason advanced is that a tacit agreement was reached among all the Members of the League at its dissolution to the effect that "Member of the League" should be construed as meaning ex-Member of the League. An agreement in 1946 could amend the provisions of Article 7, which came into existence in 1920, but it clearly cannot have any bearing on the meaning of the Article prior to the amendment. I shall deal fully with this contention when considering the legal effect of the statements and resolutions at the dissolution of the League. It is sufficient for the moment to observe that if the first two reasons are sound there would have been no need for this further agreement.

This is not a case where the Court has to decide between two possible meanings as the words "Member of the League" in Article 7 are clear and unambiguous and capable of only one meaning.

It is accordingly clear that the compromissory clause in Article 7 depended for its fulfilment on the existence of the League, and is no longer capable of fulfilment since the dissolution of the League unless *(a)* there exists a substantive rule of international law which provides for automatic substitution of ex-Members of the League or Members of the United Nations for Members of the League, or *(b)* the Respondent is a party to an agreement, express or implied, in terms whereof ex-Members of the League or Members of the United Nations were substituted for Members of the League in the aforesaid provision.

The Applicants contend that organs of the United Nations have been substituted for the Council of the League and the Mandate Commission, and that Members of the United Nations have been substituted for Members of the League in Article 7 of the Mandate. This submission is apparently mainly based on what the Applicants term "the principle of succession". On this principle they base a suggestion that even if Article 37 of the Statute of this Court had not been enacted, this Court could be held to have been substituted for the Permanent Court of International Justice in Article 7. The Applicants further submit in the alternative that "Member of the League of Nations" in Article 7 should now be read as "Member of the League of Nations at the time of its dissolution", and for this submission they rely on what they term the concept of the

limited "*de facto* survival of an entity which has been formally dissolved".

There is no substantive rule of international law which provides that where an international organization comes to an end, and another international organization performing similar functions exists at that time, that the powers and functions of the dissolved organization pass automatically to the organs of the new organization, or that the rights of the Members of the former pass to the Members of the latter, irrespective of the intention of the parties to the relevant instruments relating to these organizations. In *Ambatielos's* case (I.C.J. 1952, p. 54), Judge Levi Carneiro remarked:

> "Even when the organ which was formerly competent has been abolished, its powers cannot be regarded as automatically transferred to the new organ which replaces it."

No such rule of automatic transfer is to be found in any of the sources of international law enumerated in Article 38 of the Statute of this Court. There are no international conventions, general or particular, establishing such a rule, there is no general international custom to this effect, nor is such a rule to be found in the general principles of law recognized by civilized nations.

Apart from the fact that no source of international law recognizes such a principle, common-sense and logic require that such a rule should not exist. If it did exist it would mean that even an express provision in a treaty or convention could not avoid its effect. It follows that there can at most be a rule to the effect that, in the absence of any indication of a contrary intention by the parties to the instruments concerned, it shall be presumed that an automatic transfer was intended. But even such a general rule is not to be found in any of the sources of international law.

It may however be that the nature of a particular function of an organ of an organization which is dissolved is such that the rules of construction require the Court to imply, in the light of the evidence afforded by the particular circumstances, that a transfer must have been intended to take place. Such a conclusion would be the result of the application of rules of construction determining the intention of the parties, not the effect of a substantive rule of law.

The Applicants rely *inter alia* on two statements of the late Judge Lauterpacht, but a careful analysis of these statements in their context reveals that the Judge was here concerned with the application of rules of construction and that he did not intend to state a rule of substantive law. The first statement relied upon is a quotation from Oppenheim, L., *International Law—A Treatise,*

Volume I, Eighth Edition, ed. by H. Lauterpacht, Longmans, Green and Co., London, 1955, p. 168, and it reads as follows:

> "While as a rule the devolution of rights and competences is governed either by the constituent instruments of the organizations in question or by special agreements or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by *the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organizations in question.*" (Italics added.)

It is clear that the author was here dealing with an implied term —"reasonably assumed intention of the parties"—while also stressing the *ut res magis valeat quam pereat* rule, including the rule that one should have due regard to the object of the parties. The other passage referred to is from Lauterpacht, H., *The Development of International Law by the International Court*, Stevens and Sons, London, 1958, at page 280:

> "Such importation ... of the rules of succession in relation to international organizations is no more than an example of legitimate application of the principle of effectiveness to basic international instruments."

Here again the Judge was stressing the rule of *ut res magis valeat quam pereat* and did not intend to state a principle not based on the common intention of the parties to the instruments concerned. In fact, the statement from Oppenheim referred to above is quoted by Lauterpacht at pages 279-280 in *The Development of International Law by the International Court*, and immediately thereafter follows the second statement relied upon by the Applicants.

At page 281 of the same work, Lauterpacht states:

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

And at page 290:

> "Effectiveness being—in general—a principle of good faith is a matter of circumstance and degree... But good faith requires no more than that effect be given in a *fair and reasonable manner to the intention of the parties.* This means that on occasions, if such was the intention of the parties, good faith may require that effectiveness of the instrument should fall short of its apparent and desirable scope. The principle of effectiveness cannot transform a mere declaration of lofty purpose—such as a universal declaration of human rights—into a source of legal rights and obligations."

In support of their alternative contentions the Applicants point to the Statutes of certain States of the United States of America which by express provision enable a dissolved corporation to remain *de facto* in existence until it winds up its corporate affairs, and statutes which by express provision enable persons who were corporate directors at the time of dissolution of a corporation to sue as trustees on any claim of the corporation; and they say that civil law countries have similar legislation which keeps alive and carries over the legal existence of rights and duties of dissolved entities. I find it impossible to see on what legal principle a rule of international law can be evolved from the above to the effect that rights held by members of an international organization in their capacities as members of that organization—the right to invoke Article 7 of the Mandate was limited to Members of the League—remain in force after the dissolution and liquidation of such an organization. In each of these cases cited by the Applicants the carry-over operates solely for the purpose of winding up the affairs of the corporation. The acts authorized are performed on behalf of a corporation which is being liquidated in pursuance of the rights of that corporation, not in pursuance of the rights of its former members. It should further be noted that this limited carry-over operates solely by virtue of express legislative provisions. Even if one could apply these provisions *mutatis mutandis* in international law one could not possibly arrive at a principle such as is contended for by the Applicants. The object served by the aforesaid municipal statutory provisions is to bring about a liquidation of the rights and obligations of corporations—not to perpetuate the rights of its individual members which they held as members.

I now proceed to consider whether the Covenant of the League or the Mandate Declaration contain any provision, express or implied, to the effect that upon the dissolution of the League "Member of the League" in Article 7 of the Mandate Declaration should be construed as meaning "ex-Member of the League" or "Member of the United Nations".

It is common cause that neither Article 22 of the Covenant of the League nor Article 7 of the Mandate Declaration or any other provision of these instruments contains any express provision to the effect that upon the dissolution of the League "Member of the League" should be construed as meaning Member of the United Nations or ex-Member of the League, and the question accordingly is whether any implied provision to this effect is to be found either in the Covenant or in the Mandate Declaration.

I have already shown that the compulsory jurisdiction of the Court is not one of the securities embodied in the Covenant, and

that the compromissory clause in Article 7 was not an indispensable feature of the Mandate. In any event it is clear that had the issue been raised when the resolution which constitutes the Mandate Declaration was adopted as to what would happen to the compromissory clause on the dissolution of the League, the reply would probably have been that provision had been made for amending the Covenant of the League and the Mandate Declaration and that such an issue should be left to be dealt with by the League or the Council, in the light of circumstances prevailing at the time of the dissolution of the League. There is no justification for the suggestion that the parties would have replied that in such an event "Member of the League" should be construed as either meaning "ex-Member of the League", or "Member of another international organization performing similar functions to that of the League". To imply such a provision would amount to assuming a common intention which in fact did not exist, would constitute a total disregard for the plain and unambiguous meaning of words, and would amount to a deliberate revision, not to an interpretation, of the Mandate Declaration.

I have so far dealt with Article 7 of the Mandate Declaration. Article 6 of this Declaration has no direct bearing on jurisdiction. There is a vast difference between Articles 6 and 7. Article 6 is really not a term of the Council of the League's definition of the degree of authority, control or administration to be exercized by the Mandatory; it, in effect, merely repeats paragraph 7 of Article 22 of the Covenant and what is implied therein. The fact that these two Articles are numbered 6 and 7 in the Mandate Declaration may create the superficial impression that they must be regarded as of equal standing, but this is not justified. The provisions of the one are to be found in the Covenant of the League itself and constitute one of the securities specifically embodied in the Covenant for the performance of the sacred trust of civilization referred to therein, whereas Article 7 does not appear in the Covenant and is not one of the securities for the performance of the sacred trust.

From the above it follows that if there was any implied or tacit agreement relative to the continued application of any provision contained in the Mandate Declaration which depended on the continued existence of the League for its fulfilment, such agreement would much sooner relate to the provisions of Article 6 (that is paragraph 7 of Article 22) than to Article 7 of the Mandate Declaration.

One is accordingly entitled to assume that, if it should be found that there was no implied agreement that Article 6 of the Mandate Declaration (i.e. paragraph 7 of Article 22) would continue to apply after the demise of the League in the sense that the organs of another international body performing similar functions would be

substituted for the organs of the League, it is very improbable that it would have been impliedly agreed that on the dissolution of the League Article 7 would continue to apply in the sense that ex-Members of the League, or Members of another international organization performing functions similar to those of the League, would be substituted for Members of the League. There is considerable evidence available relative to the intention of the parties in regard to Article 6 and an investigation whether there exists an implied agreement that Article 6 should now be read as if the organs of the United Nations had been substituted for the organs of the League of Nations, seems desirable.

The obligation to report annually was limited by paragraph 7 of Article 22 of the Covenant and by Article 6 of the Mandate to an obligation to report annually to the Council of the League of Nations. As a matter of language, the words of these provisions are not capable of including an obligation to accept international supervision generally or to report to some international body other than the Council of the League. There are no rules of interpretation giving them such a meaning.

An implied term that on the dissolution of the League the functions of the Mandates Commission and the Council of the League would automatically be transferred to organs of another similar international organization cannot be said to be necessary. Supervision by the Council of the League was important, but not essential for the existence of the Mandate, but even if it was it does not follow that for that reason the parties must have intended that an organ of a future international organization would take over on the demise of the League. Respondent would certainly first have required information about the constitution of such an as yet unknown organization before assenting to any automatic substitution. It cannot be said that it is clear that if the parties, when negotiating, had adverted to the possible dissolution of the League, they would have agreed to provide for the continued supervision of the mandated territory in that particular way. Article 22 expressly provides that securities for the performance of the trust were to be embodied in the Covenant and one of the securities embodied therein was that the Mandatory was to render to the Council of the League an annual report in reference to the territory committed to its charge. Another security is that a particular commission was to be constituted to receive and examine the annual reports of the Mandatories and to advise the Council of the League on all matters relating to the observance of the Mandates. To add a further, or different security not stated in the Covenant would be to do violence to the clear and unambiguous meaning of the phrase "and that securities for the performance of this trust should be embodied in this Covenant"; and to add a term to the effect that on the demise of the League the functions of the Council of the League and the Mandates Commission would be performed by an organ of another

international organization would be tantamount to adding a security not embodied in the Covenant. The object of the parties was that the principle that the well-being and development of the peoples of South West Africa should form a sacred trust of civilization, should be applied, but their object was also that this principle should be applied and this purpose achieved within the framework of Article 22. The object was, in a sense, to define the status of South West Africa, to create an international regime, but an integral part of this definition of status, of this regime, was supervision by the Council of the League and a Mandates Commission constituted by the League. Supervision by the organs of some unknown and unforeseen international organization was not included in the definition of the status of South West Africa, was not included in this international regime. The aforesaid principle, stated in Article 22, cannot be given a meaning by inference which has the effect of altering the clear and unambiguous provisions of the rest of Article 22, e.g. it cannot be held that although the detailed provisions of Article 22 required an annual report to be sent to the Council of the League there nonetheless existed an obligation to submit reports to all civilized nations, whether Members of the League or not, inasmuch as the well-being of the peoples of the mandated territories is a sacred trust of civilization and that this well-being could be better advanced if reports were sent to all civilized States. Similarly, it cannot be held that this general principle justifies the addition of a term that on the demise of the League the organs created by some other treaty or convention would be substituted for the organs referred to in Article 22.

The relevant historical background confirms that the parties who agreed to Article 22 of the Covenant did not have any common intention that the obligation to report to the Council of the League should be interpreted as a general obligation to accept international supervision, or to report to an international institution other than the Council of the League.

It will be recalled that Article 22 of the Covenant was the result of compromise. In fact the Prime Minister of Australia (he was speaking on behalf of both Australia and New Zealand) made it clear at the conference in 1919 that this compromise represented "the maximum of their concessions". On this occasion General Botha, the South African Prime Minister, said, *inter alia:*

> "He appreciated the ideals of President Wilson... They must remember that their various peoples did not understand everything from the same point... Personally he felt very strongly about the

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

It is clear that Australia, New Zealand and Respondent were not agreeing to supervision by a possible future international organization, the composition of which they could not possibly have known.

When an agreement is the result of a compromise and an issue arises whether any given term should be implied or not, common sense dictates that one should have due regard to the attitude of the parties prior to the concession, or concessions, which made the agreement possible. It should not be inferred that a party intended to concede more than the words of the agreement conveyed and more than was necessary to effect the compromise. It was with great difficulty that certain States were persuaded to accept the supervision of the organs of the League; on what basis can it be assumed that they would have agreed to the supervision of the organs of another undefined organization? The words of a compromise should never be whittled down by way of interpretation so as to arrive at a result not contemplated by the parties. The Court clearly cannot infer a common intention to contract on the basis of a term not conveyed by the words employed by the parties where the surrounding circumstances reveal that some of the parties at least would not have agreed thereto had it been raised.

The conduct of the Members of the League subsequent to the Covenant being entered into, and subsequent to the Mandate Declaration, clearly reveals that there did not exist any common intention that the functions and powers of the League would automatically be transferred to a similar international organization on the demise of the League. At no time during the existence of the League did any Member thereof indicate that it considered that the Covenant, or the Mandate instrument, was entered into on the basis of such a provision. If such an implied term in fact existed one would have expected Members of the League who attended the San Francisco Conference in 1945 to have said so when the Mandates were discussed. One would have expected the Members of the Preparatory Commission to have made some reference thereto. One would have expected the Members of the League to have referred to it at the dissolution of the League. On this occasion the representative of China stated that there would be no automatic succession of the League's functions in respect of the Mandates to the United Nations and his statement was not chal-

lenged. In fact, not a single ex-Member of the League took up the attitude that the United Nations had succeeded to the League's functions in respect of the Mandates until 1948, when only four States made statements which could possibly be construed as a denial of Respondent's contention that the supervisory functions of the League had not been transferred to the United Nations. Thirty-four States participated in reports on debates concerning mandated territories not placed under trusteeship, and of these, 29 States expressed views in conformity with the contention that the United Nations has no supervisory authority in respect of South West Africa. Of these 29 States a large number were Members of the League at its inception. If the Covenant of the League, or the Mandate Declaration, was intended to embrace an implied provision that on the dissolution of the League another international organization performing similar functions, although differently constituted, would succeed the League, and that its organs would succeed the organs of the League, it is incredible that not a word was ever said about it, particularly during the crucial years 1945, 1946 and 1947.

I have, up to this stage, dealt with the question whether one is justified in inferring a term that on the dissolution of the League the functions and powers of the Council of the League and the Mandates Commission would be transferred to similar organs of a similar organization existing at the time of the dissolution of the League, without considering whether the organs of the United Nations can at all be said to be similar to those of the League. As I shall show *infra* there are very material differences between the functions and the constitution of the organs of the United Nations and the functions and constitution of the organs of the League and the Mandates Commission. My conclusion is that one cannot find any implied term in the Covenant or the Mandate Declaration to the effect that the powers and functions of the Council of the League and the Mandates Commission would be automatically transferred on the demise of the League to another organization differing in such material respects from the League. This conclusion affords, for the reasons I have already stated, an additional reason for holding that neither the Covenant of the League nor the Mandate Declaration contained any implied provision to the effect that on the dissolution of the League ex-Members of the League, or Members of the United Nations, would be substituted in Article 7 of the Mandate for the Members of the League.

If neither the Covenant nor the Mandate contains any provision to the effect that former Members of the League of Nations, or Members of the United Nations, would be substituted for Members of the League of Nations on the dissolution of the League, it must follow that Article 7 of the Mandate could no longer apply on the dissolution of the League unless the Respondent has been a party to some other agreement whereby ex-Members of the League of Nations, or Members of the United Nations, were substituted for Members of the League of Nations in Article 7.

For the reasons already stated I shall also inquire whether the provisions of paragraph 7 of Article 22 of the Covenant, or the provisions of Article 6 of the Mandate Declaration, were in any manner amended by the substitution of organs of the United Nations for the organs of the League. It should however be emphasized that even if it were to be found that Article 6 was thus amended it does not follow that Article 7 was similarly amended. Some of the arguments advanced in support of the contention that Article 6 still applies cannot apply to Article 7.

I now proceed to deal with the provisions of the United Nations Charter.

The Charter of the United Nations was drafted, unanimously agreed to and signed by all the representatives at the San Francisco Conference held between 24 April and 26 June 1945. It came into force on 24 October 1945. The League of Nations remained in existence until April 1946 when it was dissolved by its Members.

In a very loose and general sense it may be said that the United Nations is a successor of the League of Nations, but from a legal and historical point of view this is not so. Two of the major Powers in the United Nations, the United States of America and the U.S.S.R., were not Members of the League at its dissolution, and both were opposed to any notion that the United Nations was to be the League under a different name or an automatic successor in law to the League's assets, obligations, functions or activities. The U.S.S.R. was expelled from the League in December 1939, and the United States never was a member thereof. Membership of the League and of the United Nations were never identical. Of the fifty-one nations which constituted the Founder Members of the United Nations, seventeen were not at the time Members of the League, and eleven Members of the League were not original Members of the United Nations. The many and detailed treaties between the League of Nations and the United Nations relative to assets and non-political functions taken over by the United Nations constitute clear evidence of the fact that there was no automatic succession.

What strikes one forcibly is that no provision is made in any of the provisions of the Charter of the United Nations, either generally or specifically, for the assumption by or the transfer to the United Nations or any of its organs of the functions or duties of the organs of the League of Nations in respect of the mandates, nor is there any provision which, directly or indirectly, provides for the substitution of Members of the United Nations or ex-Members of the League for Members of the League in the Mandate Declarations. It seems that had the parties to the Charter intended to substitute the United Nations or any of its organs for the Council of the League in Article 22 or the Mandate Declaration, or that one or other of the organs of the United Nations should assume the functions of the organs of the League under the mandates, or that Membership of the United Nations or ex-Membership of the League should be substituted for Membership of the League, such intention would have been expressed in positive terms. It is incredible if in fact general agreement existed in regard to so fundamental a principle that it would have been omitted from a document drafted with such care and caution. This is particularly so when one bears in mind that the mandates are specifically referred to in the Charter.

Chapters XII and XIII of the Charter of the United Nations provide for the establishment of a Trusteeship System which, in a very broad sense, may be said to correspond to the Mandate System of the League of Nations, but it is clear that the supervisory machinery provided for in these Chapters differs very materially from that which had operated in respect of the mandates. Under the Mandate System the Mandate Commission was a body of independent experts, whereas the Trusteeship Council consists of government representatives of Member States. Under the Mandate System the ultimate supervisory authority was the Council of the League, which could only arrive at decisions on a unanimous vote. Under the Trusteeship System the ultimate supervisory authority is the Security Council in the case of a trusteeship "in the strategic areas", or otherwise it is the General Assembly of the United Nations. In the Security Council decisions may be taken by seven affirmative votes, including those of five permanent Members out of a total of eleven. In the General Assembly decisions may be arrived at by a bare majority, or on important questions by a two-thirds majority.

In *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, page 75, this Court said:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by

a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature."

Apart from the sacred trust referred to in Chapter XI, it is clear that the framers of the Charter of the United Nations contemplated only one form of trusteeship, namely that provided for in Chapters XII and XIII, and there was no contemplation of any organs of the United Nations supervising mandates in terms of the procedural provisions of the mandates concurrently with the trusteeships. Article 77 (1) of the Charter provides that the trusteeship system shall apply "to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: *(a)* territories now held under mandate...". From this it is clear that there could not have been any contemplation that the Trusteeship System would automatically without any agreement apply to the territories held under mandate. Only trusteeship agreements could bring these territories under the Trusteeship System. There could not possibly have been any intention that the organs of the Trusteeship System would automatically without any trusteeship agreement be substituted for the organs of the League in respect of territories held under mandate.

Article 37 of the Statute of this Court merely provides that when in a treaty or convention in force provision is made for reference of a matter to *inter alia* the Permanent Court of International Justice, the matter shall, as between the parties to the Statute of this Court, be referred to this Court. This Article does not even specifically refer to mandates. Its legal effect is simply to substitute the International Court of Justice for the Permanent Court of International Justice in disputes between Members of the United Nations where the Permanent Court of International Justice would otherwise in terms of a treaty or convention in force have been the forum. It may be correct to say that Article 37 kept in force the compulsory jurisdiction provisions of treaties or conventions providing for reference of disputes to the Permanent Court of International Justice which would otherwise have lapsed on the disappearance of the Permanent Court of International Justice, but it does not purport to keep alive treaties or conventions or provisions thereof that would have lapsed for any other reason.

Several conditions had to be fulfilled before Article 7 of the Mandate could be invoked against the Respondent. Two of these were *(a)* that there had to be a Permanent Court of International Justice, and *(b)* that the dispute had to exist between the Respondent and another Member of the League of Nations. Both these conditions are incapable of being complied with today, but if Article 7 of the Mandate is a treaty or convention in force, the effect of Article 37 of the Statute of this Court is to provide that this Court takes the place of the Permanent Court of International Justice, and the disappearance of the Permanent Court of International Justice would therefore not be a valid reason for holding that Article 7 of the Mandate no longer applies. The requirement that the dispute must be one between the Mandatory and another Member of the League of Nations is, however, not affected by Article 37. It should be borne in mind that Article 37 is a general provision applicable to all conventions or treaties in force containing provisions for reference of matters to *inter alia* the Permanent Court of International Justice, and any meaning given to Article 37 in regard to any particular treaty or convention must also apply *mutatis mutandis* to all other treaties or conventions in force containing provisions for reference of matters to the Permanent Court of International Justice. The words "as between the parties to the present Statute" were clearly not intended to alter and cannot be read as altering the conditions which had to be fulfilled in terms of the requirements of the different treaties or conventions before an action could be brought in the Permanent Court of International Justice. Thus, for example, if a treaty covering international fishing rights contained a provision for reference of disputes to the Permanent Court of International Justice by a party to the treaty, provided such party held a qualification such as membership of an international fishing organization, Article 37 did not substitute Membership of the United Nations for the qualification required under the treaty. Article 37 does not purport to preserve *locus standi*. The words "as between the parties to the present Statute" were obviously inserted because the parties to treaties or conventions who were not parties to the Statute of this Court would not be bound to accept the jurisdiction of this Court in the place of the Permanent Court of International Justice. Article 37 does not have and is not capable of being construed as having the effect of amending the term of Article 7 of the Mandate requiring the dispute to be one between the Mandatory and another Member of the League, and it does not mean, and it is not capable of meaning, that United Nations Membership or ex-Membership of the League was substituted for Membership of the League of Nations in Article 7. In this regard one must bear in mind that when Article 37 came into operation the League and the Permanent Court of International Justice were still legally in existence but steps for their dissolution were in contemplation.

The fact that express provision was made for substituting the International Court of Justice for the Permanent Court of International Justice in all treaties or conventions in force, without any corresponding provision being made to substitute an organ of the United Nations for the Council of the League in Article 6 or to amend the provision in Article 7 that the dispute had to be between the Mandatory and another Member of the League of Nations, is significant. Had it been the intention of the draftsmen of the Charter to amend mandates in the respects suggested, they would undoubtedly have inserted express provisions to that effect. Article 37 clearly does not contain any provision, express or implied, to the effect that the words "Member of the League of Nations" in Article 7 were replaced by the words "ex-Member of the League of Nations" or "Member of the United Nations"

I now proceed to consider the provisions of Article 80, subsection 1, and in particular its legal effect in regard to Articles 6 and 7 of the Mandate. It reads as follows:

> "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

The ordinary grammatical meaning of the words of Article 80 (1) is that Chapter XII should not be construed as *(a)* altering in any manner the rights whatsoever of any States, or *(b)* altering in any manner the rights of any peoples, or *(c)* altering in any manner *the terms of existing international instruments* to which Members of the United Nations may be parties, until trusteeship agreements have been concluded. It will be observed that this Article merely purports to be an interpretation clause, and it expressly records that it should not be interpreted as amending any rights under any existing international instruments or the terms of such instruments. If Article 80 (1) applies to mandates, it follows that, far from amending any rights under the mandates or the terms of any mandate, it expressly records that this is not being done.

It has however been suggested that this Article purports to safeguard the rights of States and peoples until trusteeship agreements are concluded. The argument then proceeds that the protection afforded these peoples by Articles 6 and 7 of the Mandate Declarations could only be safeguarded if the obligations created by these provisions remained in force after the dissolution of the

League until trusteeship agreements were entered into, and that inasmuch as the existence of the League was essential for the fulfilment of these provisions, the substitution of the organs of the United Nations for the organs of the League and Members of the United Nations or ex-Members of the League for Members of the League in Articles 6 and 7 respectively must be implied. The words of Article 80 (1) are however not capable of such a construction. They are clear and unambiguous. The Article merely purports to safeguard rights in the sense that Chapter XII must not be construed as changing any rights. Its provisions are entirely negative. If the aforesaid suggested implied term is read into Article 80 (1) it would in effect mean that the provisions of Articles 6 and 7 of the Mandate were amended in the respects indicated above; but Article 80 (1) itself contains the instruction that Chapter XII (Article 80 is part of this Chapter) is not to be construed as amending the terms of any instrument. It does not purport to provide for the continuation of rights until trusteeship agreements are concluded where such rights would otherwise have terminated, either on account of the provisions of the instrument containing them or for some other valid reason.

Article 80 (1) is clear and unambiguous, but even if it is not the relevant facts preceding the Charter of the United Nations as well as the subsequent conduct of the parties concerned make it impossible to give Article 80 (1) any meaning other than what has been stated above to be its ordinary grammatical meaning, or to infer any implied term to the effect that all the provisions of mandates were to remain in force after the dissolution of the League and then say that for this purpose the supervisory functions of the organs of the League were transferred to the organs of the United Nations and that Members of the United Nations or ex-Members of the League must be substituted for Members of the League.

If regard is had to the negotiations and discussions relating to Article 80 (1) during the drafting of the Charter, there is no indication that the natural and ordinary meaning of the words of this Article does not express the true common intention of the parties. The delegation of the Respondent circulated on 7 May 1945 among the other delegates and sought to introduce in Committee II/4 a statement which was read in the Committee on 12 May. This statement and the introductory remarks which preceded its reading are as follows:

> "I wish to point out that there are territories already under Mandate where the Mandatory principle cannot be achieved.
>
> As an illustration, I would refer to the former German territory of South West Africa held by South Africa under a 'C' Mandate.

The facts with regard to this territory are set out a in memorandum filed with the Secretariat, which I now read: When the disposal of enemy territory under the Treaty of Versailles was under consideration, doubt was expressed as to the suitability of the Mandatory form of administration for the territory which formerly constituted the German Protectorate of South West Africa.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Respondent's representative's statement on 14 May at the fourth meeting of the aforesaid Committee is reported as follows:

"The delegate from the Union of South Africa, supplementing his remarks at the third meeting, said that the Committee should bear in mind, in drawing up general principles, *that the terms of existing mandates could not be altered without the consent of the Mandatory Power.*" (Italics added.)

At the same meeting the representative of the United States of America pointed out that his Government did not seek to change the relations existing between a mandatory and a mandated territory without the former's consent. The Committee also recorded the following statement by the United States delegate:

"The delegate for the United States said that paragraph B (5) was intended as a conservatory or safeguarding clause. He was willing and desirous that the Minutes of this Committee show that it is intended to mean that all rights, whatever they may be, *remain exactly the same as they exist*—that they are neither increased nor diminished by the adoption of this Charter. Any change is left as a matter for subsequent agreements. The clause should neither add nor detract, but safeguard all existing rights, whatever they may be." (Italics added.)

The final report of the Committee to Commission II contained an explanation that specific provisions should be made to the effect that except as may be agreed upon in individual trusteeship agreements and until such agreements had been concluded, nothing in the Chapter on dependent territories is to be interpreted as altering the rights of any States or any peoples or the terms of existing *international instruments to which Member States may be parties.*

It will be observed in the first place that the object of paragraph B (5) (which became Article 80) was to guard against the alteration of rights as a result of the adoption of the Charter. In the second place, what was safeguarded were the rights of States and of any peoples and the terms of existing international instruments. It follows that Article 80 was not intended to guard against an alteration of rights which came about by the dissolution of the League.

In regard to Article 6 of the South West Africa Mandate, the right against the Respondent was that an annual report should be made to the Council of the League of Nations, and in regard to Article 7 the right to bring an action in this Court was confined to Members of the League of Nations. The facts related above clearly provide no grounds for an inference that the United Nations or any organ thereof was substituted for the Council of the League on the dissolution of the League in Article 6 of the Mandate Declaration, or that Members of the United Nations or ex-Members of the League were substituted for Members of the League in Article 7. On the contrary, they confirm the clear and unambiguous meaning of the words of Article 80 (1). In any event, the subsequent conduct of the Members of the League and Members of the United Nations clearly revealed that they never regarded Article 80 (1) as containing an implied provision amending Articles 6 and 7 of the Mandate in the respects indicated.

The League's attitude towards the transfer of its functions under treaties and conventions, including the Mandate instruments, was not known when the United Nations Charter was drafted and agreed. It was at least known that one Member of the League, namely, the Respondent, was opposed to such a transfer as far as South West Africa was concerned. Furthermore, it is clear that the whole Conference realized that the taking over of the functions of the League required investigation and further agreement. It is for this reason that towards the conclusion of the San Francisco Conference on 25 June 1945 there was established a Preparatory Commission of the United Nations, each signatory State having one Member. One of the items of the preparatory work entrusted to this Committee was to "formulate recommendations concerning the possible *transfer of certain functions,* activities and assets of the League of Nations which it may be considered desirable for the new Organization to take over *on terms to be arranged*" (italics added).

An Executive Committee of this Commission was appointed, and this Executive Committee again appointed a Sub-Committee to investigate the possible transfer of functions, activities and assets of the League. A report of the Executive Committee was considered by the Commission in London on 24 November 1945, and the Commission rendered its report on 23 December 1945.

The aforesaid Sub-Committee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League, and one of the exceptions was the political functions of the League "which have already ceased". In regard to the transfer of functions arising from treaties, however, it recommended that the United Nations should adopt a resolution expressing its willingness to exercise such functions and powers

reserving, however, *inter alia*, the right to decide which functions and powers it would be prepared to take over, and then added the following:

> "The transfer to the United Nations of functions or powers entrusted to the League of Nations by treaties, conventions, agreements or instruments having a political character would, *if the Parties to these instruments desired*, be separately considered in each case." (Italics added.)

This paragraph was apparently not intended to apply to treaties, conventions, agreements or instruments relating to the Mandates System, as will appear from the specific observation made in regard to the Mandates System. But it is significant that the Sub-Committee clearly considered that there was no general succession by the United Nations to the functions and powers entrusted to the League of Nations by treaties, conventions, agreements or instruments having a political character. These matters were to be separately considered in each case if the Parties to these instruments so desired. The specific observation made in regard to Mandates was as follows:

> "Since the questions arising from the winding up of the Mandates System are dealt with in Part 3, Chapter IV, no recommendation on this subject is included here."

It will be observed that the Sub-Committee considered that the Mandates System was being wound up, not that it was being continued, by a substitution of the organs of the United Nations for the organs of the League of Nations.

In Chapter IV (this is the chapter referred to in the aforesaid quotation), the Executive Committee recommended that, in view of possible delay in the establishment of a Trusteeship Council, a Temporary Trusteeship Committee should be created to carry out certain of the functions assigned to the Trusteeship Council. Pending the establishment of the Trusteeship Council, this Temporary Committee was to advise the General Assembly on matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities exercised until then under the Mandates System. It recommended that the following be included in the proposed provisional agenda of the Temporary Trusteeship Committee:

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

I return to the recommendations of the Sub-Committee. It recommended that a small committee should be appointed to negotiate with the Supervisory Commission of the League of Nations with

regard to the possible transfer of functions, and activities, as well as assets.

The Executive Committee in substance accepted the Sub-Committee's recommendations. Its recommendation No. 1 reads as follows:

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

A part of the footnote thereof reads:

> "The Committee recommends that no political questions should be included in the transfer. It makes no recommendation to transfer the activities concerning refugees, mandates, or international bureaux."

In regard to treaties, international conventions, agreements, and other instruments having a political character, it suggested that the following resolution should be adopted by the General Assembly:

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

The above recommendations reveal that the Members of the Sub-Committee of the Executive Committee did not consider that the United Nations had assumed the functions of the League of Nations in treaties or conventions, agreements or instruments having a political character. It was thought that the transfer to the United Nations of the functions or powers of the League under these instruments was still to be considered, and if the Parties to such instruments so desired, separately in each case. In regard to Mandates, it was specifically recommended that a Temporary Trusteeship Committee should be appointed to advise the General Assembly on matters that might arise with regard to the transfer of any functions or responsibilities to the United Nations "hitherto exercised under the Mandates System". The Executive Committee made no recommendation to transfer the activities of the League under the Mandates, but made a general recommendation in regard to treaties or conventions, agreements or other instruments having a political character, namely, that the United Nations would consider *a request from the Parties* in regard to the taking over of such functions or powers entrusted to the League.

At the discussion of the recommendations of the Executive Committee by the Preparatory Commission, objections were raised to the use of the word "transfer" in the recommendations concerning functions and activities of the League, as this word appeared to imply "a legal continuity which would not in fact exist", and it was suggested that the phrase "the assumption of responsibility for certain functions and activities" should be adopted. This was eventually done. The recommendations of the Commission relevant to functions and powers were adopted by the General Assembly in its resolution of 12 February.

The Preparatory Commission did not accept the recommendations in regard to a Temporary Trusteeship Committee. They were replaced by a recommendation that the General Assembly should adopt a resolution calling on States administering territories under League of Nations Mandates to undertake practical steps for submitting trusteeship agreements in respect of these territories, "preferably not later than during the second part of the first session of the General Assembly". No other proposal regarding the transfer of functions and activities or the assumption of these functions and activities was substituted for the rejected proposal. In the discussion in the Fourth Committee of the Preparatory Commission, preceding this resolution, Respondent's representative

> "reserved the position of his delegation until the meeting of the General Assembly, because his country found itself in an unusual position. The mandated territory of South West Africa was already a self-governing country, and last year its Legislature had passed a resolution asking for admission into the Union. His Government had replied that acceptance of this proposal was impossible owing to their obligations under the Mandate.
>
> The position remained open, and his delegation could not record its vote on the present occasion if, by so doing, it would imply that South West Africa was not free to determine its own destiny. His Government would, however, do everything in its power to implement the Charter."

In the discussion in the Plenary Committee meeting:

> "the South African delegation associated itself wholly with a desire of Committee IV to apply the principles laid down in the Charter, and that its efforts had been directed towards that end. In view, however, of the special position of the Union of South Africa, which held a Mandate over South West Africa, it reserved its position with regard to the document at present under review, and especially because South Africa considered that it had fully discharged the obligations laid upon it by the Allies, under the Covenant of the League of Nations, on the advancement towards self-government of territories under Mandate, and that the time had now come for the position to be examined as a whole. For that reason the South

African delegation reserved its attitude until the Assembly met."

Once again, these facts negative the existence of any implied term, either in the Covenant of the League, or in the Mandate Declaration, or in Article 80 (1) of the Charter of the United Nations, to the effect that the supervisory functions of the Council of the League would be transferred to an organ of the United Nations, or could be assumed by that Organization without the consent of the Mandatories. If any such tacit agreement existed and, in particular, if it had been intended that Article 80 (1) of the Charter would have that effect, one would have expected that this would have been mentioned during these deliberations and, in particular, in response to the observations of the representative of the Respondent.

The Preparatory Commission's report was considered by the General Assembly of the United Nations in January 1946. On 17 January the Respondent's representative stated:

> "Under these circumstances, the Union Government considers that it is incumbent upon it, as indeed upon all other mandatory Powers, to consult the people of the mandated territory regarding the form which their own future government should take, since they are the people chiefly concerned. Arrangements are now in train for such consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the mandate, together with its right of full liberty of action, as provided for in paragraph 1 of Article 80 of the Charter.
>
> From what I have said I hope it will be clear that South West Africa occupies a special position in relation to the Union which differentiates that territory from any other C Mandate. This special position should be given full consideration in determining the future status of the territory. South Africa is, nevertheless, properly conscious of her obligations under the Charter. I can give every assurance that any decision taken in regard to the future of the mandate will be characterized by a full sense of our responsibility as a signatory of the Charter, to implement its provisions, in consultation with and with the approval of the local inhabitants, in the manner best suited to the promotion of their material and moral well-being."

Reservations were also made on this day by the representative of the United Kingdom in regard to Palestine. Not a single delegate expressed any view to the effect that the attitudes adopted by the Respondent and the United Kingdom were inconsistent with Article 80 (1) or any other provision of the Charter or Mandate. On the contrary, the Respondent claimed that it had a full liberty of action under Article 80 (1).

On 22 January 1946, in the Fourth Committee, Respondent's representative

> "referring to the text of Article 77, said that under the Charter the transfer of the mandates regime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this Article invalidated paragraph 1. The position of the Union of South Africa was in conformity with this legal interpretation.
>
> He explained the special relationship between the Union and the territory under its mandate, referring to the advanced stage of self-government enjoyed by South West Africa, and commenting on the resolution of the Legislature of South West Africa calling for amalgamation with the Union. There would be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. When that had been done, the decision of the Union would be submitted to the General Assembly for judgment."

It will be observed that on this occasion the Respondent's representative again relied upon Article 80 (1) of the Charter, stressing that rights were not altered. His reference to submitting the decision of the people of South West Africa to the judgment of the General Assembly cannot be taken as an acknowledgment that the supervisory functions of the Council of the League had been transferred to the General Assembly. It was no more than a specific undertaking to ask the General Assembly for its judgment on this particular issue. It was obviously a matter which the Assembly could discuss at the Respondent's request.

On 9 February 1946 the General Assembly passed a resolution which stated, *inter alia:*

> "*with respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> *Welcomes* the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect *of some of those territories* and, in respect of Transjordan, to establish its independence.
>
> *Invites* the States administering territories now held under mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the trusteeship system), in order to submit these agreements for approval, preferably not later than during the second part of the first session of the General Assembly."

On 12 February 1946, it passed the following further resolution:

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

I

Functions and powers belonging to the League of Nations under international agreements

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

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

Therefore:

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

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

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

A. *Functions pertaining to a Secretariat*

. . . .

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

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

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

Therefore:

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

C. *Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character*

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

It will be observed that the statement of general willingness to ensure the continued exercise of the League's functions and powers was limited to functions and powers of a non-political character. The supervisory functions and powers of the organs of the League under the Mandates were clearly political, and the portion of the resolution under which such powers and functions fall is Part I, C (3), which required for the assumption of such functions or powers by the United Nations *(a)* a request from the parties, and *(b)* an examination of that request by the General Assembly or an appropriate organ of the United Nations nominated by the General Assembly.

In a Dissenting Opinion in the Hearing of Petitions by the Committee on South West Africa, 1956, I.C.J. 23, at page 65, Judges Badawi, Basdevant, Hsu Mo, Armand Ugon and Moreno Quintana remarked:

"Resolution 24 (I) adopted by the General Assembly on February 12th, 1946, had made provision with regard to the method to be adopted for the examination of any request 'that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character'. Here appeared the idea of a possible transfer of powers entrusted to the League of Nations. But the course indicated by that Resolution was not followed. The Union of South Africa has not submitted to the General Assembly any request that the latter should assume the 'powers entrusted' to the Council of the League of Nations."

Once again, the significance of these facts is that they are inconsistent with the suggestion that there must have been an

implied agreement in Article 80 (1) of the Charter or any other provision thereof that the United Nations would automatically, without any agreement on the part of the Mandatories, take the place of or assume the functions of the League, in regard to the Mandates.

The Assembly of the League assembled for the last time from 8-18 April 1946. On the last-mentioned date it dissolved the League. It adopted resolutions referring to the transfer of its assets and non-political functions and, in addition, also passed the following resolution relating to the Mandates:

> "The Assembly:
>
> Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:
>
> 1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the mandates system and in particular pays tribute to the work accomplished by the Mandates Commission;
>
> 2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon, and Transjordan, which have, since the last session of the Assembly, become independent members of the world community;
>
> 3. 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." (Italics added.)

To appreciate the significance of this resolution, knowledge of the events that preceded it and, in particular, of the declarations of the representatives of Mandatories at this final meeting of the League, is essential. These events and statements also clearly reveal that up to that stage there had been no agreement, express or implied, that the functions of the League relative to Mandates were to be transferred to the United Nations. The following are extracts from declarations by Mandatories:

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

"The Mandates administered by the United Kingdom were originally those for Iraq, Palestine, Transjordan, Tanganyika, part of the Cameroons and part of Togoland. Two of these territories have already become independent sovereign States, Iraq in 1923, and Transjordan just the other day in 1946. As for Tanganyika and Togoland under their mandate, and the Cameroons under their mandate, His Majesty's Government in the United Kingdom have already announced their intention of placing them under the trusteeship system of the United Nations, subject to negotiations on satisfactory terms of trusteeship.

The future of Palestine cannot be decided until the Anglo-American Committee of Enquiry have rendered their report, but until the three African territories have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—whatever those arrangements may be—it is the intention of His Majesty's Government in the United Kingdom *to continue to administer these territories in accordance with the general principles of the existing mandates.*" (Italics added.)

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

"Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates. As was fully explained at the recent United Nations General Assembly in London, the Union Government have deemed it incumbent upon them to consult the peoples of South West Africa, European and non-European alike, regarding the form which their own future Government should take. On the basis of those consultations, and having regard to the unique circumstances which so signally differentiate South West Africa—a territory contiguous with the Union—from all other mandates, it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South West Africa a status under which it would be internationally recognised as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the Mandate as an integral part of the Union. In the meantime the Union will continue to administer the territory scrupulously *in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.*

The disappearance of these organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, *will necessarily preclude complete compliance with the letter of the mandate.* The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such

time as other arrangements are agreed upon concerning the future status of the territory." (Italics added.)

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

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

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

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

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

"At the meeting of the General Assembly of the United Nations in London on January 20th last, she declared her intention of entering into negotiations with a view to placing the Territory of Ruanda-Urundi under the new regime. In pursuance of this intention, the Belgian Government has prepared a draft agreement setting out the conditions under which it will administer the territory in question.

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

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

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

Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force

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

The words "to which I have referred" referred to a prior statement which included *inter alia* the following comment relevant to 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."

If any Member of the League thought that either the Mandate Declaration, the Covenant of the League or the Charter of the United Nations contained an implied provision which had the effect of transferring the functions of the organs of the League to the organs of the United Nations and, in particular, if Article 80 (1) of the Charter had been intended to have this effect, one would have expected the Mandatories or other Members of the League present at this final meeting of the Assembly of the League to have said so.

The representative for Australia could not have thought it necessary to refer to Article 73 if he thought that the duty to account to the Council of the League would automatically be transferred to the United Nations on the dissolution of the League.

The Respondent's representative, when saying the following:

"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",

would have added that the Mandate contained an implied term or that Article 80 (1) of the Charter had been intended to mean, that the organs of the United Nations would be substituted for the

organs of the League. But he did not say so. On the contrary, he said that the Respondent would continue to *administer* the territory "scrupulously in accordance with the *obligations of the Mandate for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years* when meetings of the Mandates Commission could not be held". (Italics added.) During this period referred to by the Respondent, Article 6 was not applied. Nor was Article 7 invoked. There was no suggestion that the supervisory functions of the Council of the League were being transferred to any organ of the United Nations. Similarly, when the representative of the United Kingdom stated that it was the intention of His Majesty's Government "to continue to administer these territories in accordance with the general principles of the existing Mandates", he did not suggest that Great Britain was prepared to accept the supervision of the United Nations in the place of the Council of the League. This is not only implicit in the words used by the representatives, but also emerges clearly from the report of the United Nations Special Committee on Palestine, which is fully dealt with *infra*. A portion of the report reads as follows:

> "The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account for the exercise of its responsibilities in accordance with the terms of the Mandate. Having this in mind, at the final session of the League Assembly the United Kingdom representative declared that Palestine would be administered 'in accordance with the general principles' of the existing Mandate until 'fresh arrangements had been reached'*." (Italics added.)

The representative of China, Dr. Liang, appreciated that the aforesaid declarations of intent by the representatives of the Respondent and the United Kingdom did not embrace any undertaking to accept the supervision of the United Nations in the place of the League, and accordingly on afternoon of 9 April 1946 wished to propose for discussion the following draft resolution:

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

This resolution was, however, ruled not relevant to the items under discussion and was not proceeded with. Informal discussions followed, and Dr. Liang eventually introduced a new draft which differed very materially from the one he originally sought to introduce. This new draft was unanimously agreed to by the League Assembly. In proposing the new draft, Dr. Liang

> "recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the transfer of functions from the League to the United Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect *were not transferred automatically* to the United Nations. The Assembly should therefore take steps to secure the continued application of the principles of the mandates system. As Professor Bailey had pointed out to the Assembly on the previous day, the League *would wish to be assured* as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates.
>
> It was *gratifying* to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers *had announced their intention* to administer the territories under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon. It was to be hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply in full the *principle of trusteeship* underlying the mandates system.
>
> The Chinese delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in a concrete form and the position of the League clarified." (Italics added.)

The delegate for Egypt abstained from voting, as the view of his Government was that the dissolution of the League terminated the Mandates.

The above facts again clearly reveal that there could not have been any understanding that the Covenant, the Mandate Declarations or Article 80 (1) of the Charter impliedly provided that the functions of the organs of the League under the Mandate instruments would be transferred to the United Nations until trusteeship agreements were introduced, or that the Mandate instruments were being amended in any other respect.

It has been suggested that the aforesaid resolution of the Assembly of the League, relative to the Mandates, in effect constitutes a tacit agreement in terms whereof the Mandatories, including the Respondent, agreed with the other Members of the League that the Mandate Declarations would be amended by substituting ex-Members of the League or Members of the United Nations in the compromissory clauses for Members of the League, and to the transfer of the supervisory functions of the League to the United Nations.

This resolution, however, particularly if it is considered against the background set out above, clearly reveals that there existed no such tacit agreement.

The suggestion that the resolution was adopted "with a view of averting any objections that might be derived from the form of the words 'another Member of the League of Nations' " is the 1962 product of a fruitful imagination. It has no factual basis.

The wording of the resolution shows that there was no intention to record therein any agreement whatever. It "notes" that "Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League". It "takes note" of the expressed intentions of the Members of the League "to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates". If it was the intention of the parties to agree that the terms of the Mandate Declarations should be amended in the important respects suggested, the resolution would have said so. It is inconceivable that the trained lawyers and the skilled draftsmen at the disposal of the League would have employed the wording they did had the intention been to amend the provisions of the Mandates.

Not one of the Mandatories had made a declaration to the effect that the procedural provisions of the Mandate Declarations would continue to apply, or that they would be amended in any particular manner so as to make their fulfilment possible. The United Kingdom in its declaration had reserved its future intentions in regard to Palestine. The Respondent made it clear that it would continue to administer the territory as it had done during the "past six years". During those years the League was moribund and the Permanent Mandates Commission did not function. The League Assembly was aware that the United Nations had resolved that it would consider assuming the powers of the League in regard to the Mandates only at a request from the interested parties. The Chinese representative realized that in the absence of a request by the Mandatory the functions of the League could not be assumed by the United Nations. This he wanted to avoid when he sought to propose his first draft, in which the view was expressed that the League functions as supervisory organ for the Mandated territories should be transferred to the United Nations. This view was not only inconsistent with the views of the Members of the United Nations who had been parties to the aforesaid resolution of the United Nations, but also in conflict with the clear attitudes of at least two of the Mandatories who were present at the dissolution of the League. That such a resolution could not receive the unanimous support of the Members of the League seems obvious.

If it had been the intention to amend the Mandates in the respects suggested, why was the representative of Egypt not told when he declined to vote for the resolution on the ground that, in his view, the dissolution of the League terminated the Mandates?

To suggest that the parties had deliberately decided to express in tacit terms what had been proposed in the first Chinese draft resolution in express terms is absurd.

The resolution can clearly only reflect what the declarations by the Mandatories intended to convey, and these declarations made no reference to the procedural provisions of the Mandates Declarations but were confined to the administrative obligations relating to the well-being and development of the peoples concerned.

Only the Council of the League and the Mandatories concerned could have amended the terms of the Mandates under the provisions of Article 7 of the Mandate Declaration for South West Africa and similar provisions appearing in all the other Mandate Declarations. Had the members of the Council (or the Assembly acting on behalf of the Council) intended to act in terms of these provisions, this fact would have appeared in the resolution.

It must be borne in mind that a decision of the Council of the League had to be unanimous, and this means that before such a tacit intention can be ascribed to the Council, one must be satisfied that every member of the Council who voted for the resolution must have intended it to constitute an agreement amending the terms of the Mandate Declarations.

The representative of Australia had made it clear in his Declaration that the view of Australia was that Article 73 of the Charter of the United Nations applied to the Mandates. This view was apparently shared by the Members of the League, hence the reference to Chapter XI in the resolution. It does not matter whether the representative of Australia or the Members of the League were right or wrong in thinking that Article 73 applied to the Mandated territories. The fact is that they thought so, and this has an important bearing on their probable intentions in regard to the suggested amendments of the Mandate Declarations. If Chapter XI applies (Article 73 is one of the two articles of Chapter XI) to the Mandated territories, and if the resolution of the League was intended to amend the Mandate Declarations in the respects suggested, it means that the Members of the League intended that after the dissolution of the League there would be in operation two overlapping sacred trusts in respect of each Mandated territory, supervised by the same body, to which each Mandatory had to render two reports, that different procedures had to be followed in respect of each, and that this Court may have compulsory jurisdiction in regard to one, but not in regard to the other. Such an absurd result could not possibly have been contemplated.

I have already made it clear that in this matter the consent of the Court's jurisdiction must be embodied in a treaty or convention.

This Court can therefore only have regard to the resolution of the League for the purposes of determining jurisdiction if it is a treaty or convention in force. I fail to see how an implied term of a resolution such as the one in question can ever be regarded as a treaty or convention; but even if it is, it cannot be invoked in this Court inasmuch as Article 102 of the Charter provides that no treaty or international agreement entered into after the Charter came into force may be invoked before any organ of the United Nations if it has not been registered in accordance with the provisions of paragraph (1) of Article 102. The aforesaid resolution of the League has not been registered. I may add that several treaties entered into in pursuance of the other resolutions of the League passed at its dissolution have been duly registered. The inference that the parties did not consider the resolution to constitute a treaty or international agreement is inescapable.

Neither before nor since the dissolution of the League has the Respondent been a party to any agreement in terms whereof any of the provisions of the Mandate instrument were amended. At no time did the Respondent request the United Nations to assume any function or power of the League under the Mandates, nor did the General Assembly of the United Nations or any organ nominated by it ever consider such a request. The Respondent did not at any time admit that the United Nations had taken over the functions of the League; on the contrary, it has consistently denied that the United Nations had been substituted for the League.

Many of the founder Members of the United Nations who attended the San Francisco Conference and the dissolution of the League have expressed views which reveal that they were unaware of any common intention or tacit agreement that the United Nations was being substituted for the League in the Mandate instruments or that the obligation to report to the Council of the League of Nations had been amended so that the report now has to be made to the United Nations. How can such a common intention be inferred when it does not appear from the words of the instruments and when so many parties to the instruments were unaware thereof?

The trusteeship agreement for the Mandated territory of Narau was entered into as late as November 1947, i.e. more than a year after the League of Nations had ceased to exist. The United Kingdom withdrew from the administration of Palestine in May 1948, more than two years after the dissolution of the League, yet no reports were submitted to the United Nations in respect of

either territory during the aforesaid periods. If there had been the suggested tacit agreement, one would have expected reference to have been made thereto, when no reports were forthcoming from the Mandatories of the aforesaid territories. It is common cause that not a single State ever suggested that such reports should be submitted.

A study of the history of the Palestine Mandate reveals that Members of the United Nations could not have had any intention of substituting the United Nations in the place of the League in Mandates. The resolution of the League Assembly applied as much to Palestine as it applied to South West Africa; Article 80 (1) of the Charter of the United Nations applied as much to Palestine as it applied to South West Africa. A United Nations Special Committee, consisting of eleven Members, was appointed to examine the case of Palestine. These members were Australia, Canada, Czechoslovakia, Guatemala, India, Iran, Netherlands, Peru, Sweden, Uruguay and Yugoslavia. In its report dated 3 September 1947, the Committee clearly expressed its view that there was on the dissolution of the League no supervisory authority in respect of the administration of Palestine, and that no obligation on the part of the Mandatory to submit to any supervision existed. This appears from the following extracts from the report:

> "The Mandatory Power, in the absence of the League and its Permanent Mandates Commission, had no international authority to which it might submit reports and generally account for the exercise of its responsibilities in accordance with the terms of the Mandate."
>
> "The international trusteeship system, however, has not automatically taken over the functions of the Mandates System with regard to mandated territories. Territories can be placed under trusteeship only by means of trusteeship agreements approved by a two-thirds majority of the General Assembly. The most the Mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration in the spirit of the Mandate without being able to discharge its international obligations in accordance with the intent of the Mandates System."

The above report on Palestine contained, *inter alia*, also a special note by Sir Abdur Rahman, the representative of India, which contained the following passage:

> "Moreover, the international machinery in the form of the Permanent Mandates Commission which had been created for the purpose of scrutinising the actions of the Mandatory Powers, and to which they were bound to submit annual reports has, along with the League of Nations, ceased to exist. *There are no means by which the international obligations in regard to Mandates can be discharged by the United Nations.*" (Italics added.)

I have already pointed out that until 1948 not a single Member of the United Nations or a single ex-Member of the League contend-

ed that the organs of the United Nations had been substituted for the organs of the League in respect of the Mandates. No less than 29 States expressed views in conformity with the Respondent's contention that the United Nations has no supervisory authority in respect of South West Africa. I quote a few examples:

On 25 September 1947, Mr. Lui Chieh of China expressed the following view in the Fourth Committee:

> "The only choice lay between trusteeship and the grant of independence. Article 80, paragraph 2, of the Charter further proved the obligatory character of the (the trusteeship) system... If the Union of South Africa placed South West Africa under trusteeship, it would not be deprived of the administration of the territory; *and the only change would be the placing of that administration under international supervision.*" (Italics added.)

Again, on 1 November 1947, he made the following statement in the General Assembly:

> "We are told that the Union of South Africa would administer the Territory of South West Africa in the spirit of the Mandate of the League of Nations. I do not doubt the sincerity of this statement on the part of the Union of South Africa, but we all know that the mandate system has ceased to exist and that the Trusteeship System has been established. Would it not be more desirable to administer the Territory in question under a living system than under the shadow of a ghost system?"

On the same day, Mr. Yepes of Colombia made the following remarks in the General Assembly:

> "... on whose behalf would the mandate of the old League of Nations be exercised?
>
> It could certainly not be the League of Nations, for it has ceased to exist, and the mandate could not be exercised on behalf of a dead institution. In civil law, as we all know, power of Attorney ceases upon the death of the principal. The same idea extends, by analogy, to international law. We can conclude that, since the League of Nations is dead, mandates exercised under its authority have also lapsed, and the territories concerned must fall under the Trusteeship System established by Article 77 of the Charter."

On 26 September 1947, the representative of Cuba made the following statement in the Fourth Committee:

> *Mr. Meyer:* "... the information submitted by the Government of the Union of South Africa with regard to South West Africa could not be examined since South West Africa was neither a Trust Territory nor a Non-Self-Governing Territory"

In December 1947, India submitted a draft resolution which contained the following statement:

"*Whereas* the territory of South West Africa, though not self-governing, is at present outside the control and supervision of the United Nations."

On 12 December 1947, Mr. Gerig of the United States of America expressed the following view in the Trusteeship Council:

"It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, *we do not*, in the absence of a trusteeship agreement, *have supervisory functions over this territory*. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exists." (Italics added.)

On 19 March 1948, the United States representative expressed the following view in the Security Council:

"The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The records seem to us entirely clear that the United Nations did not take over the League of Nations Mandates System."

During the years following the establishment of the United Nations, the Respondent's representatives repeatedly asserted that the supervisory functions of the organs of the League had not been transferred to the United Nations, and until 1948 not a single State contradicted this assertion. Thus, for example, on 25 September 1947, in the Fourth Committee, Mr. Lawrence, representing the Respondent, said:

"In respect of its Administration of South West Africa, that Government [of the Union of South Africa] would maintain the *status quo* in the spirit of the Mandate. It would not submit a trusteeship agreement, but would transmit information annually. Information relating to 1946 was now in the hands of the Secretary-General."

And two days later, also in the Fourth Committee, he amplified his remarks as follows:

"In reply to the request made by the Danish representative at the 31st meeting regarding clarification of document A/334, Mr. Lawrence stated that the Mandate gave certain powers and imposed certain obligations. The Government of the Union of South Africa had full powers of administration over South West Africa, and it proposed to continue to exercise them, just as it would continue to fulfil its obligations under the Mandate to promote the moral and material well-being of the population and to advance social progress. The Union of South Africa did not claim that South West Africa was a colony, but it was willing to submit annual reports like those required for the Non-Self-Governing Territories under Article 73 *(e)*.

The right to petition had ceased to exist with the disappearance of the League of Nations, the authority to which petitions could be addressed. In the absence of a trusteeship agreement, the United Nations had no jurisdiction over South West Africa and therefore no right to receive petitions."

On 1 November 1947, in the General Assembly, Mr. Lawrence again emphasized that reports rendered by the Union to the United Nations were being rendered on the basis that the United Nations has no supervisory jurisdiction in respect of the territory. He is reported to have said:

"In addition, the Government of the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands.

Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this Territory, they will serve to keep the United Nations informed in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 *(e)* of the Charter."

These assertions were not challenged.

One therefore finds that, not only was nothing said in the Charter of the United Nations or at the time of its drafting, to the effect that the Council of the League was being superseded in the Mandate by an organ of the United Nations, or that the supervisory functions of the Council of the League were being transferred to the United Nations, but also that nothing was said to this effect prior to the dissolution of the League, at the dissolution of the League, or during the years immediately following the dissolution of the League. On the contrary, one finds that the declarations by the Respondent's representatives, and the representatives of other Members of the United Nations during this time, reveal that it was not assumed that the organs of the United Nations would automatically become heir to the powers and functions of the organs of the League in the Mandate instruments.

The history of the Preparatory Commission, the history of the dissolution of the League, the report of the Palestine Commission, the statements by the Respondent and other Members of the United Nations in a variety of circumstances and situations, and within a comparatively short time after the San Francisco Conference, when the events of what happened at the Conference were still reasonably fresh in their memories, effectively negative the suggestion that there was a tacit agreement between Members of the United Nations and the Mandatories that the organs of the United Nations would be substituted for the organs of the League relative to the supervision of the Mandates.

It should be noted that at no stage was it even suggested that the Mandate instruments were being amended by substituting ex-

membership of the League or membership of the United Nations for membership in the League of Nations in the provisions of the Mandates Declarations. It was not mentioned at the San Francisco Conference, it was not mentioned by the Preparatory Committee, it was not mentioned at the dissolution of the League. During the years following immediately upon the dissolution of the League not a single State expressed the view that it was under the impression that such an amendment had been brought about.

The above considerations compel me to conclude that those provisions of the Mandates which depended for their fulfilment on the existence of the League of Nations were not impliedly amended in any respect, and accordingly ceased to apply on the demise of the League; in any event that the compromissory clause in Article 7 was not amended in any way, and accordingly no longer applies.

The conclusion to which I have come is in conflict with parts of the Advisory Opinion of this Court given in 1950 in International Status of South West Africa, *I.C.J. Reports 1950*, p. 128. It must therefore be carefully examined. Although the Court's finding in regard to Article 6 is not directly relevant to the issue now being considered, it is difficult owing to the overlapping of reasons to confine oneself to the Court's reasons for its conclusion in regard to Article 7 without reference to the decision in regard to Article 6.

The conclusion of the majority of the Court in regard to Articles 6 and 7 of the Mandate is to be found in the following extracts from the Opinion:

> "It follows from what is said above that South West Africa is still to be considered as a territory held under the Mandate of December 17th, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions.
>
> According to Article 7 of the Mandate, disputes between the mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions."

Before dealing with the specific reasons advanced in the majority Opinion for the aforesaid conclusions, some general remarks in the Opinion preceding these reasons should be commented on:

"The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by international law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa."

While it is correct to say that the notions of mandate in municipal law cannot be applied in the interpretation of the provisions of the Mandate instruments, this is no reason for ignoring the fact that Article 22 of the Covenant of the League is a term of an agreement, and that the rights and obligations created thereby must be determined in accordance with the provisions of the international law relating to the interpretation of treaties and conventions, that is, this Court must determine as accurately as possible the true common intention of all the parties concerned, in accordance with the appropriate rules of construction. Rosenne, *op. cit.*, page 318, crisply states the principle as follows:

"Treaty interpretation attempts to elucidate the combined intention of two or more signatories."

It has been shown that Article 22 of the Covenant must be interpreted with due regard to all its provisions and to all the relevant facts, and that the detailed obligations of the Respondent recorded therein cannot be amended by this Court by reason of the general principles stated therein; in particular, this Court has no power to provide for its own compulsory jurisdiction.

If, therefore, the above quoted statement of the Court was intended to suggest that the obligations of the Respondent exceeded those it intended to undertake when agreeing to Article 22 of the Covenant, it cannot be accepted as correct. Nor can the Mandate Declaration be interpreted as meaning that the Respondent had agreed to accept the supervision of another international body on the dissolution of the League, or that it had agreed that the words "Member of the League" in Article 7 could be amended by this Court to read "Members of the United Nations" or "ex-Members of the League".

On page 133 the Opinion states, "the authority which the Union Government exercises over the territory is based on the Mandate". To this one should add that, similarly, the Respondent's obligations are based on the Mandate.

The Opinion then proceeds:

"If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights

derived from the Mandate and to deny the obligations thereunder could not be justified."

Inasmuch as the Respondent's attitude in 1950 was that the Mandate had lapsed, the above remark was relevant to show that this attitude was inconsistent with any claim that the Respondent still had rights which flowed from the Mandate. It however has no relevance to the question whether Article 6 or 7 still applies. In any event, if in law Articles 6 and 7 no longer apply, and if the effect thereof is that Respondent's rights under the Mandate have terminated, the fact that Respondent still claims these rights cannot revive Articles 6 and 7. If the whole of the Mandate has lapsed, Article 7 no longer applies; if Articles 1-6 or 1-5 are still in force, it does not follow that the compromissory clause in Article 7 still applies in the sense that it is capable of being invoked. As I have already indicated, the compromissory clause of Article 7 is clearly not essential for the existence of the other provisions.

The Opinion then proceeds:

"These international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the 'securities for the performance of this trust' referred to in the same article."

If this statement was intended to mean that the provisions of Article 7 of the Mandate which provide that any Member of the League of Nations could institute proceedings against the Respondent in the event of a dispute relating to the interpretation or application of the provisions of the Mandate was one of the securities referred to in Article 22, it is incorrect. I have already pointed out, when dealing with the provisions of Article 22, that this Article required the application of the principle that securities for the performance of the sacred trust were to be embodied in the Covenant, and that no provision in regard to compulsory jurisdiction relative to the Mandates was embodied in the Covenant. If this Court were to hold that the compulsory jurisdiction provided for in Article 7 of the Mandate Declaration corresponds to the securities "for the performance of this trust referred to in Article 22", it would be treating the words "should be embodied in this Covenant" as meaningless.

The Opinion then proceeds:

"The first-mentioned group of obligations are defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. The Union undertook the general obligation to promote to the utmost the mate-

rial and moral well-being and the social progress of the inhabitants. It assumed particular obligations relating to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries.

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

It seems clear that the learned judges must have overlooked, just as Counsel in the present matter apparently overlooked, the fact that Article 5 of the Mandate Declaration contains, *inter alia*, the following provision:

> "The Mandatory ... 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",

and that, unlike the other provisions of Articles 2 to 5, this provision depended on the existence of the League for its fulfilment. In this respect this provision should have been classified with Articles 6 and 7.

The first reason advanced by the Court for its finding that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were transferred to the United Nations is the following (page 136):

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ had ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions."

It is not clear on what principles the above reasoning is based. The Court apparently equated the supervisory functions of the

Council of the League to "international supervision", and similarly equated the supervisory functions under the trusteeship system to "international supervision", then found that the necessity for "international supervision" remained after dissolution of the League and concluded that, therefore, the one "international supervision" must be substituted for the other "international supervision". This approach ignores the basic rule of construction that one must have regard to the intention of the parties. It in any event ignores the important difference between the League and the United Nations, the historical facts relating to these institutions and, above all, the plain meaning of the provisions of the respective instruments.

There are no express provisions in the Covenant, the Mandate or the Charter providing for the substitution of any organ of the United Nations for the Council of the League. The Court's conclusion could therefore only have been based on what it considered were the implied provisions of the Covenant and/or the Mandate and/or the Charter. I have dealt in great detail with these instruments and I think I have shown conclusively that no such implied provisions are to be found in any of them.

I have already indicated that Article 22 of the Covenant and Article 6 of the Mandate did not provide for "international supervision"; they provided for an annual report by the Mandatory in reference to the territory committed to its charge, to be rendered to the Council of the League of Nations, and for a permanent commission to receive and examine such reports, and to advise the Council of the League on all matters relating to observance of the Mandate. There is no justification for imputing to the States concerned an intention of contracting on the basis that on the dissolution of the League, the supervisory functions of the organs of the League would be transferred to the organs of another international organization performing similar functions but differently constituted. Neither the words of Article 22 of the Covenant and Article 6 of the Mandate, nor the circumstances under which these instruments were entered into justify such an inference. In fact, it is clear that had such a term been suggested, it would not have been agreed to by the Mandatories. The subsequent conduct of the parties clearly reveals that no such intention existed. To substitute an obligation to accept the supervision of an organ of the United Nations for an obligation to accept the supervision of the Council of the League is to amend and increase the obligation undertaken by the Respondent. It would amount to legislation and this Court has no legislative powers.

It is correct to say that the authors of the Charter had in mind supervision of territories placed under trusteeship agreements by organs of the United Nations, but it is also clear that the intention was that this supervision would only take place after trusteeship agreements had been entered into. The fact then that the Covenant

provided for supervision of Mandates by the Council of the League and the Permanent Commission, and that the Charter provides for supervision by the Trusteeship Council, the General Assembly and the Security Council after mandated territories had been brought under the International Trusteeship System can, however, not justify an inference that therefore an obligation to submit to supervision of an organ of the United Nations rests upon the mandatories after the supervisory organs of the League had ceased to exist, even though no trusteeship agreement has been entered into. As already indicated, neither the express provisions of the Charter, nor the relevant circumstances justify an inference that it was the intention to transfer the supervisory functions of the organs of the League to the organs of the United Nations.

If Article 73 of the Charter does not apply to mandated territories, it may be said that it would have been desirable that provision should have been made for supervision of the Mandates by an organ of the United Nations after the dissolution of the League, and until trusteeship agreements were entered into, but this is no justification for reading an implied provision to this effect into the Charter. It is the duty of this Court to interpret treaties, not to revise them. To say that in such a situation international law refuses to acknowledge that no legal provision for international supervision exists and that this Court is therefore entitled to nominate an organ of an international organization as a substitute for the organ that has disappeared, is to propound a new rule for which no legal basis exists.

The above conclusion of the Court is even more startling when it is borne in mind that the Court found that this unexpressed term whereby organs of the United Nations were substituted for the organs of the League was qualified in several respects, viz., this supervision should not exceed that which applied under the Mandate System, and should conform as far as possible to the procedure followed by the Council of the League of Nations. The difficulty experienced by the Members of this Court in 1955 and 1956 in interpreting this implied provision is in itself a strong indication that the requisite common intention to contract on the basis of such a term never existed, and should not be inferred.

The above reason is followed by the following:

> "These general considerations are confirmed by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. It purports to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ."

In another passage, when dealing with the question whether the group of obligations contained in Articles 2 and 5 of the Mandate (which the Court held did not depend for their fulfilment on the existence of the League) came to an end on the dissolution of the League, the Court said at page 133:

> "This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. It is true that this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System."

The true effect of the aforesaid statements of the Court seems to be that it found that Article 80 (1) impliedly amended the provisions of the Mandates, so that all their provisions should continue to apply, but the specific nature of these amendments has not been indicated. However, as stated above, Article 6 of the Mandate could only apply after the dissolution of the League if one or other organ of the United Nations was substituted for the organs of the League, and that Article 7 could only apply if ex-Membership of the League or Membership of the United Nations was substituted for Membership of the League. I shall assume that the Court intended to convey that it thought that these amendments were impliedly brought about by Article 80 (1).

There is clearly no justification for reading any such implied terms into Article 80 (1). There is nothing in the Article to suggest that the parties must have contracted on the basis of such amendments. On the contrary, the suggested construction would be in direct conflict with the clear and express injuction in the Article that it shall not be construed as altering in any manner the terms of the Mandates.

Article 80 (1) clearly does not purport to "maintain" or "safeguard" anything against something not contained in Chapter XII of the Charter.

A finding that Articles 6 and 7 ceased to apply on the dissolution of the League does not in any way conflict with the provision of Article 80 (1). The "rights" of the peoples of South West Africa did not include the continued application of Articles 6 and 7 of the Mandate after the demise of the organization on which these articles depended for their fulfilment.

There can be no doubt that the parties to the Charter would have used positive terms had they intended that the provisions of the Mandates would be amended so that they could remain effective under all circumstances and in all respects until each territory was placed under the Trusteeship System; they would not have used language incapable of having this meaning.

If regard is had to the history of the Charter, there is even less justification for the assumption by the Court that Article 80 (1) presupposes that none of the provisions of the Mandates would cease to apply on the dissolution of the League. The relevant facts, such as the *travaux préparatoires*, including statements by Respondent's representative at the San Francisco Conference, the subsequent conduct of the parties including statements on behalf of the Respondent, the recommendations of the Preparatory Commission, the resolutions of the United Nations, the statements and resolutions at the dissolution of the League, the report of the Palestine Commission and the numerous statements of Members of the United Nations during the years 1946, 1947 and 1948 clearly reveal that no such common intention existed.

In dealing with Article 80 (1) Sir Arnold McNair in his Separate Opinion said, at p. 160:

> "A second contention was based on the expression occurring in Article 80, paragraph 1, of the Charter that 'nothing in this Chapter [XII] shall be construed in or of itself to alter in any manner the rights whatsoever of any States or peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties'. But the cause of the lapse of the supervision of the League and of Article 6 of the Mandate is not anything contained in Chapter XII of the Charter but is the dissolution of the League, so that it is difficult to see the relevance of this Article."

The legal effect of Article 80 (1) is very aptly stated by Mr. Joseph Nisot in an article on the Advisory Opinion of the International Court of Justice on the International Status of South West Africa *(South African Law Journal)*, Vol. 68, Part III (August 1951), pp. 278-279:

> "The only purpose of the Article is to prevent Chapter XII of the Charter from being construed as in any manner affecting or altering the rights whatsoever of States and peoples, as they stand pending the conclusion of trusteeship agreements. Such rights draw their judicial life from the instruments which created them; they remain valid in so far as the latter are themselves still valid. If they are maintained, it is by virtue of those instruments, not by virtue of Article 80, which confines itself to providing that the rights of States and peoples—whatever they may be and to whatever extent may subsist—are left untouched by Chapter XII.

These rights, the Court holds, continue to exist, since they have been maintained by Article 80. But even supposing it did maintain anything, Article 80 could only maintain whatever existed. It could neither resurrect extinct nor create new ones.

Now, what, in actuality, were the rights derived by peoples from the Mandate and from Article 22 of the Covenant? They were not rights to the benefit of abstract supervision and control. They consisted of the right to have the administration supervised and controlled by the *Council of the League of Nations*, and, in particular, the right to ensure that annual reports were rendered by the mandatory Power to the *Council of the League of Nations*, as it was, and the right to send petitions to the *Secretariat of the League of Nations*. What has become of these rights? They have necessarily disappeared as a result of the disappearance of the organs of the League (Council, Permanent Mandates Commission, Secretariat).

The Court could not correctly conclude that such rights had been maintained by Article 80, except by contending at the same time that, for the purposes of the Mandate for South West Africa, the said organs had survived the dissolution of the League.

(d) Being unable, and for good reasons, so to contend, the Court creates *new* rights. To the Court, the right of peoples 'maintained' by Article 80 is linked to the *United Nations* Organization. It is a right to supervision and control by the *United Nations*, to which annual reports and petitions are, in consequence, to be rendered and addressed. Lacking any other available provision in the Charter, the Court founds such a conclusion on Article 80. According to its thesis, it is because Article 80 'maintains' the rights of peoples that these, though linked to the League, must now be deemed linked to the United Nations! To infer this from a text worded as Article 80 amounts to assuming that, with respect to the Mandates System, the United Nations stands as the legal successor of the League, an assumption inconsistent with the discussions of San Francisco and with the very fact that the Charter provides for the conclusion of Trusteeship Agreements."

Manley O. Hudson in the *American Journal of International Law*, Vol. 45, 1951, criticizes the Court's decision as follows:

"Article 80 (1) of the Charter seems to be the principal basis of the Court's conclusion that the Union of South Africa must report to the General Assembly. This Article provided that, until the conclusion of Trusteeship Agreements, nothing in Chapter XII of the Charter should 'be construed *in or of itself to alter in any manner the rights whatsoever of any States or any peoples* or the terms of existing international instruments' (italics supplied). The text clearly shows an intention that Chapter XII should not effect any alteration of rights or terms. This intention was 'entirely negative in character'. The provision served an obvious purpose when Chapter XII of the Charter was drawn up: the Mandate was still in force at that time: as the League of Nations had not then been dissolved, any alteration of the existing situation was a matter for its consideration. Article 80 (1) was a precautionary provision designed to negative the accomplishment of any change in the existing situation by reason of Chapter XII 'in or of itself'. It is not surprising that

Judge McNair found it 'difficult to see the relevance of this Article'.

Yet the Court gave an affirmative effect to Article 80 (1), turning it into a positive 'safeguard' for maintaining the rights of States and the rights of the peoples of the Mandated Territory. This is the more notable because at a later stage the Court stressed the 'entirely negative' character of Article 80 (2), declining to say that the latter imposed a positive obligation on the Mandatory even to negotiate with a view to the conclusion of a Trusteeship Agreement.

No attention was paid by the Court to the fact that certain States, which as Members of the former League of Nations may have 'rights' under Article 22 of the Covenant and under the Mandate itself, had no responsibility for the Charter and have never become Members of the United Nations. For example, Finland, Ireland and Portugal, which were represented at the final session of the Assembly of the League of Nations in 1946, are in this category. If their rights are 'maintained' by Article 80 (1) of the Charter, they have no voice in the supervision to be exercized by the General Assembly."

George Schwarzenberger in *International Law*, 3rd edition, Vol. 1, p. 101, commented *inter alia* as follows:

"... the World Court was faced with the issue of whether the United Nations had become responsible for the discharge of the supervisory function which the League had formerly exercized in relation to the only still surviving Mandate. In support of a positive answer, the Court could neither rely on any general principle of succession between international persons nor any relevant transaction between the two collective systems. Nonetheless, on the basis of a threefold argument, it arrived at this conclusion.

The Court pointed out that the '*raison d'être* and original object' of the international obligations entered into by the Union of South Africa had not changed. All that had happened was that the former supervisory organ had disappeared. The United Nations, however, had at its disposal 'another international organ performing similar, though not identical supervisory functions'. The Court strengthened this reasoning by its interpretation of the declared intentions of the Mandatories, including the Union of South Africa, to continue the administration of the mandates in accordance with the mandates treaties until other arrangements should have been made between the United Nations and the Mandatories. The Resolution of April 18th, 1946, of the League Assembly which took note of these intentions of the Mandatories presupposed that 'the supervisory functions exercized by the League would be taken over by the United Nations'. The still missing link with the United Nations was provided by the Court's interpretation of Article 80 of the Charter of the United Nations. It was admitted in the majority Opinion that 'this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing inter-

national instruments'. Still, with the assistance of a somewhat debatable presupposition and 'obvious' intentions, the last gap was bridged. It is not surprising that Judge McNair should have found it 'difficult to see the relevance of this Article'.

Having filled the legal void which separated the supervisory functions of the League of Nations from those of the United Nations, the Court proceeded with its self-imposed task of 'judicial legislation'."

The third reason advanced by the Court for its finding that the functions of the organs of the League may now be exercized by the organs of the United Nations is as follows:

> "The Assembly of the League of Nations, in its Resolution of April 18th, 1946, gave expression to a corresponding view. It recognized, as mentioned above, that the League's functions with regard to the Mandated Territories would come to an end, but noted that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant. It further took note of the intentions of the Mandatory States to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the Mandatory Powers. This Resolution presupposes that the supervisory functions exercized by the League would be taken over by the United Nations."

This Resolution of the Assembly of the League of 18 April 1946 has already been fully dealt with. It will be recalled that the United Nations Resolution of 12 February 1946 relating to the functions and powers of the League under treaties, international conventions, agreements or other instruments of a political character were to the effect that the United Nations would examine any request from the parties, and that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations. The League Resolution remained silent in regard to this particular Resolution, and apart from the one dealing specifically with the Mandates, it confined its resolutions to functions, powers and activities of a non-political character. From this one must infer that inasmuch as the United Nations in terms of its resolutions had resolved that it would examine each treaty separately when requested to do so by the parties, the League Assembly considered that there was no further function for it to perform. The Assembly of the League was aware of the resolutions of the United Nations and if, despite these resolutions, it intended to transfer the League's function relative to the Mandates to the United Nations, it would have passed a resolution to that effect. The draft resolution of China, it will be recalled, expressly drew the League's attention to the fact that the supervisory function of the organs of the League were not being transferred to the United Nations, and proposed that the League's function as supervisory organ for

mandated territories should be transferred to the United Nations until the Trusteeship Council should be constituted. This was in direct conflict with the Resolution of the United Nations and would in all probability not have had the unanimous approval that a resolution of the League required. The fact that it was dropped and another resolution, omitting the aforesaid provision, adopted, proves that the League of Nations did not intend to transfer its functions as the supervisory organ for mandated territories to the United Nations. See in this regard Hogg's Treaty Interpretation, *Minnesota Law Review*, 1959, page 43.

I have already dealt with the statements of the Mandatories and the Resolution of the Assembly of the League at its dissolution. They, too, contain no evidence of an assumption that the supervisory function of the League would be taken over by the United Nations. On the contrary, if regard is had to all the facts, there is no justification whatsoever for the assumption in the majority Opinion in regard to the "presupposition" that the supervisory function of the League would be taken over by the United Nations. The Court was obviously unaware of all the relevant facts relating to the Resolution of the League Assembly, e.g. the original resolution of the representative of China. It was certainly unaware of its significance as no mention is made thereof in the Judgment. Had the Court been aware of all the facts and their true significance, it would not, and could not have arrived at the conclusion it did.

In any event the League resolution is not a treaty or convention, and even if it is, it has not been registered in terms of Article 102 of the Charter, and cannot therefore be invoked in this Court.

Nisot, *op. cit.*, p. 280, criticizes the Court as follows:

> "*(e)* However, the Court also invokes, as supporting its conclusions, the Resolution of 18th April 1946 whereby the Assembly of the League of Nations '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'.
>
> But one fails to see how this statement can provide any support for a suggestion that it was the Assembly's opinion that a Mandatory Power, though not bound by a Trusteeship Agreement, was under an obligation to submit to supervision and control by the United Nations.
>
> This was no more the opinion of the Assembly of the League of Nations than that of the General Assembly of the United Nations, which, by its Resolution of 9th February 1946, urged the conclusion of trusteeship agreements, implying that no implementation of the

principles of the Trusteeship System—therefore, no supervision or control—was possible in the absence of such agreements."

Hall, in *Mandates, Dependencies and Trusteeship*, p. 273, commented as follows in regard to the League Assembly Resolution of 18 April 1946:

> "The significance of this Resolution of the League Assembly becomes clearer when it is realized that for many months the most elaborate discussions had been taking place between the governments as to the exact procedure to be adopted in making the transition between the League and the United Nations. It was the function of the Preparatory Commission and the committees succeeding it to make recommendations on the transfer of functions, activities, and assets of the League. All the assets of the League had been carefully tabulated. All its rights and obligations that could be bequeathed to the United Nations and which the latter desired to take over were provided for in agreements that were made. But in the case of mandates, the League died without a testament."

Manley O. Hudson commented as follows in the Twenty-Ninth Year of the World Court, *American Journal of International Law*, Vol. 45, 1951, p. 13:

> "To support its additional conclusion that the Union of South Africa is obliged to submit to the supervision of, and to render annual reports to, the United Nations, the Court relied upon a resolution adopted by the final Assembly of the League of Nations on 18 April 1946, which was said to presuppose 'that the supervisory functions exercized by the League would be taken over by the United Nations'. This is hardly borne out by the text of the Resolution, however."

The final reason advanced in the majority Opinion and the Court's conclusion are as follows:

> "The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercized by the General Assembly in Resolution 141 (II) of November 1st, 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949.
>
> For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercized by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it."

This final reason can hardly be termed the reason for the above conclusion. It will be observed that Article 10 only applies if a

question or matter is within the scope of the Charter or relates to the power and functions of any organ provided for in the Charter, and the General Assembly is merely authorized to discuss and make recommendations on such questions or matters. The General Assembly undoubtedly has the right to discuss a report that is made to it, but its right to discuss a report which is made to it has no bearing on the question whether there is a legal obligation to report to it. If the legal effect of Article 80 (1) of the Charter is that the Mandatory's obligations to make annual reports to the Council of the League relating to the administration of the mandated territories were to be converted into obligations to furnish these reports to an organ of the United Nations after the dissolution of the League and until trusteeship agreements were entered into, discussions and recommendations in regard thereto would be within the powers of the General Assembly in terms of Article 10.

Manley O. Hudson, *op. cit.*, p. 14, remarks as follows:

> "The Court seems to have placed emphasis on the competence of the General Assembly to exercise supervision and to receive and examine reports. Such competence can hardly be doubted. Yet it does not follow from the conclusion that the General Assembly 'is legally qualified to exercise the supervisory functions previously exercised by the League of Nations', that the Union of South Africa is under an obligation to submit to supervision and control by the General Assembly, or that it is obligated to render annual reports to the General Assembly."

In dealing with Article 7 of the Mandate, the aforesaid majority Opinion states:

> "According to Article 7 of the Mandate, disputes between the Mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions."

No other reasons were stated for this conclusion. It will be observed that the first, third (the Resolution of the League at its dissolution) and fourth reasons advanced in the majority Opinion for the conclusion that the supervisory functions of the League were transferred to the United Nations, are not mentioned in the above paragraph. The only articles referred to are Article 80 (1) of the Charter of the United Nations, and Article 37 of the Statute of the International Court of Justice.

As already stated, if Article 7 of the Mandate remained unamended, it can no longer apply as it depended for its fulfilment on the existence of the League. As there is no League in existence there can be no Members of the League, and accordingly no State has *locus standi* to bring proceedings under the provisions of Article 7 in its original form. If Article 7 still applies, it can only apply in an amended form, that is, if ex-members of the League or Members of the United Nations have been substituted for Members of the League, and if this Court has been substituted for the Permanent Court of International Justice. I shall assume that the Court meant that this was brought about by the provisions of Article 37 of its Statute and Article 80 (1) of the Charter.

I have already pointed out that the legal effect of Article 37 of the Statute of this Court is that in treaties or conventions in force, this Court is substituted for the former in the place of *inter alia* the Permanent Court of International Justice. It does not purport to amend the qualifications prescribed in any treaty or convention and it does not, and cannot, have the effect of substituting ex-Membership of the League of Nations or Membership of the United Nations, for Membership of the League in Article 7 of the Mandate. The Court must therefore have relied exclusively on the provision of Article 80 (1) for its view that Article 7 was amended by substituting ex-Membership of the League or Membership of the United Nations for Membership of the League.

I have already dealt with Article 80 (1) of the Charter, and I have shown that it does not and was not intended to alter the provisions of any mandates. There was not the slightest suggestion at any time, either when Article 80 was drafted, or therefater that ex-Members of the League or Members of the United Nations were substituted in Article 7.

Judge Read in his separate Opinion at page 169 said:

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

It is not clear on what reasoning the learned Judge arrived at this conclusion. He apparently argued that inasmuch as the Mandate for South West Africa was still in existence, the rights of States which were Members of the League at its dissolution must still exist. It is not possible to reconcile this reasoning with the Judge's conclusion that inasmuch as the League had come to an end Respondent's obligations in respect of reporting and accountability had come to an end. He does not appear to have appreciated

that just as Article 6 of the Mandate depended for its fulfilment on the existence of the League, so Article 7 depended for its fulfilment on the existence of Members of the League. Presumably his reasons were the same as those of Judge McNair, with which I shall deal presently.

In his separate Opinion Sir Arnold McNair said:

> "The *judicial supervision* has been expressly preserved by means of Article 37 of the Statute of the International Court of Justice adopted in 1945:
>
> > 'Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'
>
> This article effected a succession by the International Court to the compulsory jurisdiction conferred upon the Permanent Court by Article 7 of the Mandate; for there can be no doubt that the Mandate, which embodies international obligations, belongs to the category of treaty or convention; in the judgment of the Permanent Court in the *Mavrommatis Palestine Concessions (Jurisdiction)* case, Series A, No. 2, p. 35, the Palestine Mandate was referred to as an 'international agreement'; and I have endeavoured to show that the agreement between the Mandatory and other Members of the League embodied in the Mandate is still 'in force'. The expression 'Member of the League of Nations' is descriptive, in my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it'; their interest in the performance of the obligations of the Mandate did not accrue to them merely from membership of the League, as an examination of the content of the Mandate makes clear. Moreover, the Statute of the International Court empowers it to call from the parties for 'any document' or 'any explanations' (Article 49); and to entrust any 'individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry...' (Article 50). Article 94 of the Charter empowers the Security Council of the United Nations to 'make recommendations or decide upon measures to be taken to give effect to the judgment' of the Court, in the event of a party to a case failing to carry out a judgment of the Court. In addition, the General Assembly or the Security Council of the United Nations may request the Court to give an advisory opinion on any legal question (Article 96 of the Charter)."

I must confess that I do not understand the significance in the inquiry of the articles of the Statute of this Court and the Charter referred to in the sentence commencing: "Moreover the Statute of the International Court..."

The learned Judge came to the conclusion that the word Member of the League of Nations in Article 7 is descriptive, and that it did not mean "so long as the League exists and they are Members

of it". I have dealt fully with the provisions of the Mandate and the Covenant and I have indicated that the phrase "Member of the League of Nations" cannot mean "ex-member of the League of Nations". "Member of the League" must clearly in the absence of any amendment of Article 7 be given the same meaning today it had when the Mandate first came into existence. Membership of the League was necessary before a State could obtain *locus standi* to bring proceedings under Article 7, and similarly continued Membership was necessary to retain such *locus standi*. The clear and unambiguous meaning of the words "Member of the League" is therefore a Member of the League at the time when the particular provisions of the Article are sought to be applied. It was clearly never intended that the rights conferred on Members of the League as Members of the League would continue to be held after Membership had ceased. The words "Member of the League" appear in all the Mandates and when construed in their context cannot include States which were but are no longer Members of the League.

The meaning of the words "Member of the League" in Article 7 is so clear that the task of interpretation can hardly be said to arise. It is not allowed to interpret that which has no need of interpretation.

The learned Judge further stated that the interest of Members of the League in the performance of the obligations of the Mandate "did not accrue to them merely from Membership of the League, as an examination of the content of the Mandate makes clear". Be this as it may, it is clear that the right to bring proceedings in the Permanent Court of International Justice accrued to Members of the League entirely from such Membership. This right flows from Article 7 of the Mandate and from nothing else. If Article 7 were repealed no such right would have remained. If the Article never existed, the right would never have existed.

It is accordingly clear that even if Members of the League had an interest in the performance of the Mandate which did not accrue from their Membership such interest could not provide any State with *locus standi* to bring proceedings in the Permanent Court of International Justice where such *locus standi* was not conferred by Article 7 of the Mandate.

Manley O. Hudson criticizes Judge McNair's opinion as follows in the *American Journal of International Law*, Vol. 45 (1951), p. 16:

> "Judge McNair expressed the view that this expression is 'descriptive, not conditional', and that it does not mean *so long as the*

League exists and they are Members of it. Yet what States does it describe? Does the phrase mean another State which was a Member of the League of Nations on December 17, 1920? If so, Brazil would be included, though it withdrew from the League of Nations in 1923, and Egypt and Mexico would be excluded because they were admitted to the League of Nations at later dates. Does the phrase now mean another State which was a Member of the League just prior to its dissolution? Judge McNair seems to have been willing to give it this import. Yet some States in this category—for example, Portugal, whose territory borders on South West Africa—may not now be 'States entitled to appear before the Court'. In any event, the meaning is so imprecise that perhaps the Court might have shown more hesitance in declaring the replacement to be made in the second paragraph of Article 7 of the Mandate."

The question now arises to what extent the 1950 Advisory Opinion of this Court should be considered binding in these proceedings. It is common cause that an Opinion has not the authority of *res judicata* nor does the *stare decisis* rule apply. I have already referred to the provisions of Article 38 and Article 59 of the Statute of this Court, the effect of which is that a decision of this Court is only binding on the parties thereto and that its decisions must be regarded as subsidiary means for the determining of rules of law. In its Opinion of 30 March 1950 (*Interpretation of Peace Treaties 1950*, I.C.J., page 71), this Court held that "The Court's reply is only of an advisory character, it has no binding force", and "The Court's Opinion is given not to States but to the organ which is entitled to request it". This Court will obviously not readily depart from a prior ruling especially if the subsequent proceedings involve substantially the same legal issues. It must, in view of its high mission, attribute to its Opinions legal value and moral authority, but when in a subsequent proceeding it becomes clear that an Opinion previously given is wrong, this Court, however reluctant it may be to do so, has no option but to say so.

The issue with which this Court was primarily concerned in 1950 was whether the Mandate was still in force; the question whether Article 7 still applied was not formulated as a specific question for the Court's consideration and was merely an incidental issue. It apparently received very little attention. Dr. Stein, who appeared on behalf of the Respondent, advanced the contention that by reason of the dissolution of the League there were no longer any States which could invoke Article 7 of the Mandate but he apparently regarded this contention as a legal proposition which did not require further argument. The Majority Opinion disposed thereof in one single passage, the meaning of which is obscure. In any event, it has been shown that the two Articles, that is, Article 37 of the Statute of this Court and Article 80 (1) of the Charter, relied upon by the Court, cannot support its conclusion. It is abundantly

clear that the Court was either unaware of all the facts or failed to appreciate their true significance. A full consideration of all the material facts leads to the inescapable conclusion that the aforesaid statement in the 1950 Opinion was erroneous. In these circumstances there can be no doubt that it is now this Court's duty to rectify and not to perpetuate its error.

I accordingly come to the conclusion that Article 7 of the Mandate cannot be invoked as there are no longer Members of the League to do so. The Respondent has not been a party to any agreement in terms whereof it agreed that after the dissolution of the League ex-Members of the League or Members of the United Nations would be substituted for Member of the League in Article 7 of the Mandate Declaration. It follows that the Applicants have no *locus standi* and this Court no jurisdiction in the present proceedings.

* * *

It is clear that a finding in favour of the Respondent on any of the issues raised in the Objections necessarily means that this Court has no jurisdiction to deal with the present matter, but in view of the importance of this matter I shall briefly state my views in regard to some aspects of the remaining issues. At the outset I wish to state that I am in full agreement with the Opinions of President Winiarski, Judge Sir Percy Spender and Judge Sir Gerald Fitzmaurice and Judge Morelli.

The issues stated in the Applications in effect relate exclusively to the tutelage obligations of the Respondent concerning the peoples of South West Africa and the Applicants do not claim that their own interests or that of their citizens are affected. It is clear that the Applicants' only motive for bringing these proceedings is their humanitarian concern for the peoples of the aforesaid territory.

This raises the question whether the Respondent has agreed to the Applicants submitting to this Court disagreements relating exclusively to the interpretation or application of the Respondent's tutelage obligations and not affecting the Applicants' legal rights or the legal rights of their citizens.

The compromissory clause in Article 7 provides for reference of any "dispute" relating to the interpretation or application of the provisions of the Mandate to the Permanent Court of International Justice. The enquiry is whether what is sought to be referred to this Court is a "dispute" within the meaning of this clause.

The first question that arises is whether the word "dispute" in Article 7 means "disagreement embracing any difference of opinion" or whether it means "a difference concerning the legal rights of the parties". Both meanings are possible and one must now invoke the rules of construction and determine, in the light of such evidence

of intention as is available, which of these meanings should be preferred. The reasons for preferring the latter meaning are, in my opinion, unanswerable.

If the word "dispute" is given the meaning of "disagreement embracing any difference of opinion" it leads to absurd results. It would mean that it was intended that a Member State could bring academic differences of opinion to this Court or differences of opinion relating solely to the interests of another Member of the League or even a non-Member.

It will be recalled that the draft Mandate Declaration submitted by the British Government to the Council of the League contained a provision which provided for disputes between Members of the League relating to the interpretation or application of the provisions of the Mandate to be submitted to the Permanent Court of International Justice. The reason for changing the wording to the present form was that Members of the League could not be bound without their consent. There was no intention to change the meaning of the word "dispute". If the wording of the original draft was retained and if the word "dispute" is given the meaning of any difference of opinion it would have meant that one Member of the League could have brought proceedings against another Member of the League relating to a difference of opinion as to the rights of a third State.

A study of the provisions of Article 36 of the Statute of the Permanent Court of International Justice leaves no doubt that it was intended that the Permanent Court of International Justice should, apart from its duty to give Opinions, be concerned with legal disputes only. It seems to me quite clear that had any State referred a dispute to the Permanent Court of International Justice for adjudication in respect of a matter which did not concern the rights of such State or its citizens the Court would have refused to deal with the matter. It would have said that in terms of its own constitution it was not competent to deal with differences of opinion or with conflicts of views unrelated to the legal rights of the party requesting adjudication.

The generally accepted meaning of the word "dispute" in compromissory clauses is a difference between States concerning their legal rights.

It is clear from the Judgment of the majority, as well as from the minority Opinions in the *Mavrommatis* case, P.C.I.J., Series A, No. 2, that a legal right was regarded as necessary for *locus standi* on the part of the Applicant. If the word "dispute" was considered to embrace all disagreements irrespective of any legal right or interest on the part of the Member of the League seeking to invoke the Article there would have been no need for enquiring into the legal rights of the Greek Government.

In my view, there can be no doubt that the word "dispute" should be interpreted as meaning a disagreement between the Mandatory

and another Member of the League concerning the legal rights of such Member.

The next enquiry is whether the present proceedings relate to a disagreement concerning the Applicants' legal rights.

Applicants contend that they possess the legal right to demand compliance by the Respondent of all its tutelage obligations, irrespective of whether such obligations affect their rights or the rights of their citizens. This contention requires a careful examination of the provisions of Article 22 of the Covenant of the League of Nations and the provisions of the Mandate Declaration.

It will be observed that paragraph 2 of Article 22 of the Covenant provides that the tutelage of the peoples of the territory concerned should be exercised by the Mandatory on behalf of the League. It does not provide that the tutelage should be exercised on behalf of the League and its individual Members. The Mandatory is required by paragraph 7 of Article 22, to report to the Council of the League. There is no provision requiring the Mandatory to account to any individual Member of the League. Paragraph 1 of Article 22 provides that securities for the performance of the sacred trust of civilization are to be embodied in the Covenant itself. These securities do not include supervision by the individual Members of the League.

Article 22 of the Covenant of the League requires the Mandatory to exercise the tutelage of the peoples concerned on behalf of the League. It is clear that Article 22 conferred no general rights on individual States to supervise the Mandatories in any way other than through their activities as Members of the League. The fact that Members of the League were concerned about the well-being and development of these peoples does not mean that it was intended that each individual State should have the right to demand from the Mandatory compliance with the tutelage obligations. The fact that Members of the League were entitled to participate in the discussions of the League did not confer legal rights on each Member of the League to supervise the Mandates. The common humanitarian concern of Member States for the well-being and development of these peoples led to the creation of a supervisory body and this supervisory body was clothed with the general right to claim compliance by the Mandatory of its tutelage obligations.

It is clear that the intention was that all the provisions relating to the Mandatories should be embodied in Article 22 save that under the provisions of paragraph 8 of Article 22 "the degree of authority, control or administration to be exercised by the Mandatory" was to be agreed upon by the Members of the League and if they failed to do so it was to be explicitly defined by the Council of the League. There, accordingly, was not only no provision to the effect that individual Member States of the League would have the right to demand compliance by the Mandatory of its sacred trust

obligations but no provision was made for any organ of the League, or any other body, adding a provision to this effect. Article 22 of the Covenant of the League could only be amended by the Members of the League whose representatives composed the Council and by a majority of the Assembly in terms of Article 26 of the Covenant. The Council of the League could not do so on its own. The Council of the League could, therefore, only define the degree of control, authority or administration to be exercized by the Mandatory but could not amend Article 22. The authority to define the degree of control, authority or administration did not include authority to add to the securities set out in Article 22, not only because its authority under paragraph 8 did not include such a power, but also because Article 22 requires in terms the application of the principle that securities for the performance of the trust should be embodied in the Covenant.

The Council of the League was not authorized to add to, or to vary, the securities set out in Article 22. Its sole function was to define the degree of authority, control or administration to be exercized by the Mandatory. It had no authority to provide for the control to be exercized over the Mandatory.

If it is correct to say the Council of the League could not amend Article 22 and if it is correct to say that the Council of the League could not add to the securities for the performance of the sacred trust set out in Article 22, it follows that if Article 7 of the Mandate Declaration purported to have this effect it cannot be valid. If Article 7 means that each Member of the League of Nations was given the legal right to demand compliance with the sacred trust obligations of the Mandatory, it means that the Council not only exceeded its authority under Article 22 (8) but that it purported to amend Article 22. Article 7 should be given a meaning which renders it valid rather than one that renders it invalid. It would be valid if it is construed as a provision that Members of the League could refer disagreements relating to their own rights to the Permanent Court of International Justice.

In addition to the provisions exclusively designed to promote the well-being and development of the peoples of the territories concerned, Article 22 also contained provisions designed primarily for the benefit of Member States, e.g., the so-called open-door provisions for trade and commerce. Even in regard to these obligations Members of the League were clearly given no general right to demand compliance therewith. Each State could only demand compliance in so far as its interests, or the interests of its citizens, were concerned. If, for example, State A was given greater opportunities of trade by a Mandatory than any other State, State A could not institute proceedings under the provisions of the compromissory clause to claim that its opportunity should be less or that the opportunities of another State should be more.

It seems clear that the compromissory clause in Article 7 was not designed to create legal obligations other than the obligation on the part of the Respondent to submit to the jurisdiction of the Permanent Court of International Justice in respect of any proceedings brought by Members of the League to enforce their legal rights under the Mandates. In other words, Article 7 merely provides for the adjudication of disagreements in which the Plaintiff State has a legal right, but it does not create any other legal rights. The legal rights of the Member States must be gathered from Article 22 of the Covenant of the League and the Mandate as a whole. I have already indicated that the supervisory functions with regard to the Mandates were in express terms reserved for the Council of the League, and that there could not have been any intention that in addition each and every Member of the League would stand in the position of custodian of the rights of the peoples of the territories concerned.

My conclusion, accordingly, is that the Respondent has not agreed to the Applicants instituting any action against it on the interpretation or application of the provisions of the Mandate where the Applicants' own rights, or the rights of their citizens, are not in issue, and this affords an additional reason for holding that this Court has no jurisdiction to adjudicate upon the present proceedings.

(Signed) J. T. VAN WYK.