INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

SOUTH WEST AFRICA CASES

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

SECOND PHASE

JUDGMENT OF 18 JULY 1966

1966

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU SUD-OUEST AFRICAIN

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

DEUXIÈME PHASE

ARRÊT DU 18 JUILLET 1966

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18 July 1966

SOUTH WEST AFRICA CASES

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

Alleged contraventions of League of Nations Mandate for South West Africa—Question of the legal status of the Applicants—Status governed by their position as former members of the League—Antecedent question arising on the merits of the case whether Applicants, as individual States former members of the League, have any legal right or interest in the subject-matter of their claim—Character of the mandates system within the framework of the League—Effect of Article 22 of the League Covenant instituting the system generally—Obligations of each mandatory defined in particular instruments of mandate—Structure of these instruments—Clauses conferring in respect of the mandated territory direct commercial or other special rights on League members in their capacity as separate States—Clauses providing for the carrying out of the mandate as a "sacred trust of civilization" in regard to the inhabitants of the territory—Mandatory's obligations under latter class of clauses owed to League as an entity, not to member States individually—Lack of any legal right for member States individually to claim performance of these obligations—Additional rights not acquired by reason of dissolution of the League.

Political, moral and humanitarian considerations not in themselves generative of legal rights and obligations.

Jurisdictional clause of the mandates—Effect of decision given by the Court in 1962 on the question of its competence—Relationship between decisions on a preliminary objection and any question of merits—Inability in principle of jurisdictional clauses to confer substantive rights—Capacity to invoke a jurisdictional clause does not imply existence of any legal right or interest relative to the merits

of the claim—Interpretation of jurisdictional clause of the mandates—Jurisdictional clauses of the minorities treaties not comparable—Analysis of League practice in respect of mandates—Inconsistency with existence of rights now claimed by the Applicants.

Functions of a court of law—Limits of the teleological principle of interpretation—Court not entitled by way of interpretation to revise, rectify or supplement.

JUDGMENT

Present: *President* Sir Percy SPENDER; *Vice-President* WELLINGTON KOO; *Judges* WINIARSKI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; *Judges* ad hoc Sir Louis MBANEFO, VAN WYK; *Registrar* AQUARONE.

In the South West Africa cases,

between

the Empire of Ethiopia,

represented by

H.E. Dr. Tesfaye Gebre-Egzy,
Hon. Ernest A. Gross, Member of the New York Bar,

as Agents,

assisted by

Hon. Edward R. Moore, Under-Secretary of State of Liberia,
Mr. Keith Highet, Member of the New York Bar,
Mr. Frank G. Dawson, Member of the New York Bar,
Mr. Richard A. Falk, Professor of International Law, Princeton University and Member of the New York Bar,
Mr. Arthur W. Rovine, Member of the Bar of the District of Columbia,

as Counsel,

and by

Mr. Neville N. Rubin, Lecturer in African Law at the School of Oriental and African Studies of the University of London and Advocate of the Supreme Court of South Africa,

as Adviser;

the Republic of Liberia,

represented by

H.E. Mr. Nathan Barnes,
Hon. Ernest A. Gross,

as Agents,

Hon. Edward R. Moore,

as Agent and Counsel,

assisted by

Mr. Keith Highet,
Mr. Frank G. Dawson,
Mr. Richard A. Falk,
Mr. Arthur W. Rovine,

as Counsel,

and by

Mr. Neville N. Rubin,

as Adviser,

and

the Republic of South Africa,

represented by

Dr. J. P. verLoren van Themaat, S.C., Professor of International Law at the University of South Africa and Consultant to the Department of Foreign Affairs,
Mr. R. G. McGregor, Deputy Chief State Attorney,

as Agents,

and by

Mr. R. F. Botha, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Agent and Adviser,

assisted by

Mr. D. P. de Villiers, S.C., Member of the South African Bar,
Mr. G. van R. Muller, S.C., Member of the South African Bar,
Dr. P. J. Rabie, S.C., Member of the South African Bar,
Mr. E. M. Grosskopf, Member of the South African Bar,
Dr. H. J. O. van Heerden, Member of the South African Bar,
Mr. A. S. Botha, Member of the South African Bar,
Mr. P. R. van Rooyen, Member of the South African Bar,

as Counsel,

and by

Mr. H. J. Allen, Department of Bantu Administration and Development,

Mr. H. Heese, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Advisers,

THE COURT,

composed as above,

delivers the following Judgment:

By its Judgment of 21 December 1962, the Court rejected the four preliminary objections raised by the Government of South Africa and found that it had jurisdiction to adjudicate upon the merits of the dispute submitted to it on 4 November 1960 by the Applications of the Governments of Ethiopia and Liberia. Time-limits for the filing of the further pleadings on the merits were fixed or, at the request of the Parties, extended, by Orders of 5 February 1963, 18 September 1963, 20 January 1964 and 20 October 1964; and the second

phase of the cases became ready for hearing on 23 December 1964, when the Rejoinder of the Government of South Africa was filed.

Pursuant to Article 31, paragraph 3, of the Statute, and the Order of the Court of 20 May 1961, the Governments of Ethiopia and Liberia, acting in concert, chose Sir Louis Mbanefo, Chief Justice of the Eastern Region of Nigeria, to sit as Judge *ad hoc*. In accordance with the same Article, the Government of South Africa chose the Honourable J. T. van Wyk, Judge of the Appellate Division of the Supreme Court of South Africa, to sit as Judge *ad hoc*. Both judges had sat in the first phase of the proceedings.

On 14 March 1965, the Government of South Africa notified the Court of its intention to make an application to the Court relating to the composition of the Court for the purposes of these cases. The said notification was duly communicated to the Agents for the Applicants. The Court heard the contentions of the Parties with regard to the application at closed hearings held on 15 and 16 March 1965 and decided not to accede to the application. This decision was embodied in an Order of 18 March 1965.

Public sittings of the Court were held during the periods 15 March to 14 July and 20 September to 29 November 1965.

During these public sittings the Court heard the oral arguments and replies to H.E. Mr. Nathan Barnes, Hon. Ernest A. Gross, Agents, and Hon. Edward R. Moore, Agent and Counsel, on behalf of the Governments of Ethiopia and Liberia and of Dr. J. P. verLoren van Themaat, S.C., Mr. R. F. Botha, Agents, Mr. D. P. de Villiers, S.C., Mr. E. M. Grosskopf, Mr. G. van R. Müller, S.C., Mr. P. R. van Rooyen, Dr. H. J. O. van Heerden and Dr. P. J. Rabie, S.C., Counsel, on behalf of the Government of South Africa.

At the hearings from 27 April to 4 May 1965, the Court heard the views of the Parties on a proposal made by counsel for South Africa at the hearing on 30 March 1965 to the effect that the Court should carry out an inspection *in loco* in the Territory of South West Africa and also that the Court should visit South Africa, Ethiopia and Liberia, and one or two countries of the Court's own choosing south of the Sahara. At the hearing on 24 May 1965 the President announced that this request would not be deliberated on by the Court until after all the evidence had been called and the addresses of the Parties concluded. At the public sitting on 29 November 1965 the President announced that the Court had decided not to accede to this request. This decision was embodied in an Order of the same date.

At the hearing on 14 May 1965, the President announced that the Court was unable to accede to a proposal made on behalf of Ethiopia and Liberia that the Court should decide that South Africa, in lieu of calling witnesses or experts to testify personally, should embody the evidence in depositions or written statements. In the view of the Court, the Statute and Rules of Court contemplated a right in a party to produce evidence by calling witnesses and experts, and it must be left to exercise the right as it saw fit, subject to the provisions of the Statute and Rules of Court.

At the hearings from 18 June to 14 July and from 20 September to 21 October 1965, the Court heard the evidence of the witnesses and experts called by the Government of South Africa in reply to questions put to them in examination, cross-examination and re-examination on behalf of the Parties, and by Members of the Court. The following persons gave evidence: Dr. W. W. M. Eiselen, Commissioner-General for the Northern Sotho; Professor E. van den Haag, Professor of Social Philosophy at New York University; Professor J. P. van S. Bruwer, Professor of Social and Cultural Anthropology at the University

of Port Elizabeth; Professor R. F. Logan, Professor of Geography at the University of California, Los Angeles; Mr. P. J. Cillie, Editor of *Die Burger*, Cape Town; The Rev. J. S. Gericke, Vice-Chairman of the Synod of the Dutch Reformed Church of South Africa and Vice-Chancellor of the University of Stellenbosch; Professor D. C. Krogh, Head of the Department of Economics, University of South Africa; Mr. L. A. Pepler, Director of Bantu Development in South Africa; Dr. H. J. van Zyl, Deputy Secretary, Department of Bantu Education; Dr. C. H. Rautenbach, Rector of the University of Pretoria; Mr. K. Dahlmann, Editor of the *Allgemeine Zeitung*, Windhoek; Brigadier-General S. L. A. Marshall, Chief Historian of the United States Army in various theatres; Professor C. A. W. Manning, formerly Professor of International Relations, University of London; Professor S. T. Possony, Director of International Political Studies Programme, Hoover Institute, Stanford University.

In the course of the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia,

in the Applications:

"Wherefore, may it please the Court, to adjudge and declare, whether the Government of the Union of South Africa is present or absent and after such time limitations as the Court may see fit to fix, that:

A. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920; and that the aforesaid Mandate is a treaty in force, within the meaning of Article 37 of the Statute of the International Court of Justice.

B. The Union of South Africa remains subject to the international obligations set forth in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, and that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory; and that the Union is under an obligation to submit to the supervision and control of the General Assembly with regard to the exercise of the Mandate.

C. The Union of South Africa remains subject to the obligations to transmit to the United Nations petitions from the inhabitants of the Territory, as well as to submit an annual report to the satisfaction of the United Nations in accordance with Article 6 of the Mandate.

D. The Union has substantially modified the terms of the Mandate without the consent of the United Nations; that such modification is a violation of Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

E. The Union has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; its failure to do so is a violation of Article 2 of the Mandate and Article 22

of the Covenant; and that the Union has the duty forthwith to take all practicable action to fulfil its duties under such Articles.

F. The Union, in administering the Territory, has practised *apartheid*, i.e. has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory.

G. The Union, in administering the Territory, has adopted and applied legislation, regulations, proclamations, and administrative decrees which are by their terms and in their application, arbitrary, unreasonable, unjust and detrimental to human dignity; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to repeal and not to apply such legislation, regulations, proclamations, and administrative decrees.

H. The Union has adopted and applied legislation, administrative regulations, and official actions which suppress the rights and liberties of inhabitants of the Territory essential to their orderly evolution toward self-government, the right to which is implicit in the Covenant of the League of Nations, the terms of the Mandate, and currently accepted international standards, as embodied in the Charter of the United Nations and the Declaration of Human Rights; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease and desist from any action which thwarts the orderly development of self government in the Territory.

I. The Union has exercised powers of administration and legislation over the Territory inconsistent with the international status of the Territory; that the foregoing action by the Union is in violation of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty to refrain from acts of administration and legislation which are inconsistent with the international status of the Territory.

J. The Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly.

K. The Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of the League of Nations rules; and that the Union has the duty to transmit such petitions to the General Assembly.

The Applicant reserves the right to request the Court to declare and adjudge with respect to such other and further matters as the Applicant may deem appropriate to present to the Court.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Application, and to make all necessary

awards and orders, including an award of costs, to effectuate its determinations";

in the Memorials:

"Upon the basis of the foregoing allegations of fact, supplemented by such facts as may be adduced in further testimony before this Court, and the foregoing statements of law, supplemented by such other statements of law as may be hereinafter made, may it please the Court to adjudge and declare, whether the Government of the Union of South Africa is present or absent, that:

1. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by his Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920;

2. the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;

3. the Union, in the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practised *apartheid*, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory;

4. the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfill its duties under such Articles;

5. the Union, by word and by action, in the respects set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the actions summarized in Section C of Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the Territory;

6. the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory;

7. the Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly;

8. the Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that the Union has the duty to transmit such petitions to the General Assembly;

9. the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

The Applicant reserves the right to request the Court to declare and adjudge in respect to events which may occur subsequent to the date this Memorial is filed, including any event by which the Union's juridical and constitutional relationship to Her Britannic Majesty undergoes any substantial modification.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Memorial, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations";

in the Reply:

"Upon the basis of the allegations of fact in the Memorials, supplemented by those set forth herein or which may subsequently be adduced before this Honourable Court, and the statements of law pertaining thereto, as set forth in the Memorials and in this Reply, or by such other statements as hereafter may be made, Applicants respectfully reiterate their prayer that the Court adjudge and declare in accordance with, and on the basis of, the Submissions set forth in the Memorials, which Submissions are hereby reaffirmed and incorporated by reference herein.

Applicants further reserve the right to request the Court to declare and adjudge in respect of events which may occur subsequent to the date of filing of this Reply.

Applicants further reiterate and reaffirm their prayer that it may please the Court to adjudge and declare whatever else it may deem fit and proper in regard to the Memorials or to this Reply, and to make all necessary

awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa,

in the Counter-Memorial:

"Upon the basis of the statements of fact and law as set forth in the several Volumes of this Counter-Memorial, may it please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia as recorded at pages 168 to 169 of their Memorials are unfounded and that no declaration be made as claimed by them.

In particular Respondent submits:

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

2. In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:

(a) Relative to Applicants' Submissions Nos. 2, 7 and 8,
that Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body. Respondent is therefore under no obligation to submit reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body;

(b) Relative to Applicants' Submissions Nos. 3, 4, 5, 6 and 9,
that Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations";

in the Rejoinder:

"1. Upon the basis of the statements of law and fact set forth in the Counter-Memorial, as supplemented in this Rejoinder and as may hereafter be adduced in further proceedings, Respondent reaffirms the Submissions made in the Counter-Memorial and respectfully asks that such Submissions be regarded as incorporated herein by reference.

2. Respondent further repeats its prayer that it may please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia, as recorded in the Memorials and as reaffirmed in the Reply, are unfounded, and that no declaration be made as claimed by them."

In the oral proceedings the following Submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia,

at the hearing on 19 May 1965:

"Upon the basis of allegations of fact, and statements of law set forth in the written pleadings and oral proceedings herein, may it please the Court to adjudge and declare, whether the Government of the Republic of South Africa is present or absent, that:

(1) South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on 17 December 1920;

(2) Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;

(3) Respondent, by laws and regulations, and official methods and measures, which are set out in the pleadings herein, has practised apartheid, i.e., has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that Respondent has the duty forthwith to cease the practice of apartheid in the Territory;

(4) Respondent, by virtue of economic, political, social and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has, in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles;

(5) Respondent, by word and by action, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of Respondent's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to cease such actions, and to refrain from similar actions in the future; and that Respondent has the duty to accord full faith and respect to the international status of the Territory;

(6) Respondent has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to remove all such military bases from within the Territory; and that Respondent has the duty to refrain from the establishment of military bases within the Territory;

(7) Respondent has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that Respondent has the duty forthwith to render such annual reports to the General Assembly;

(8) Respondent has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that Respondent has the duty to transmit such petitions to the General Assembly;

(9) Respondent has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of Respondent directly or indirectly to modify the terms of the Mandate.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to these submissions, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa,

at the hearing on 5 November 1965:

"We repeat and re-affirm our submissions, as set forth in Volume I, page 6, of the Counter-Memorial and confirmed in Volume II, page 483, of the Rejoinder. These submissions can be brought up-to-date without any amendments of substance and then they read as follows:

Upon the basis of the statements of fact and law as set forth in Respondent's pleadings and the oral proceedings, may it please the Court to adjudge and declare that the submissions of the Governments of Ethiopia and Liberia, as recorded at pages 69-72 of the verbatim record of 19 May 1965, C.R. 65/35, are unfounded and that no declaration be made as claimed by them.

In particular, Respondent submits—

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

(2) In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:

(a) Relative to Applicants' submissions numbers 2, 7 and 8, that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body. Respondent is therefore under no obligation to submit

reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body;

(b) Relative to Applicants' submissions numbers 3, 4, 5, 6 and 9, that the Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations."

* * *

1. In the present proceedings the two applicant States, the Empire of Ethiopia and the Republic of Liberia (whose cases are identical and will for present purposes be treated as one case), acting in the capacity of States which were members of the former League of Nations, put forward various allegations of contraventions of the League of Nations Mandate for South West Africa, said to have been committed by the respondent State, the Republic of South Africa, as the administering authority.

2. In an earlier phase of the case, which took place before the Court in 1962, four preliminary objections were advanced, based on Article 37 of the Court's Statute and the jurisdictional clause (Article 7, paragraph 2) of the Mandate for South West Africa, which were all of them argued by the Respondent and treated by the Court as objections to its jurisdiction. The Court, by its Judgment of 21 December 1962, rejected each of these objections, and thereupon found that it had "jurisdiction to adjudicate upon the merits of the dispute".

3. In the course of the proceedings on the merits, comprising the exchange of written pleadings, the oral arguments of the Parties and the hearing of a considerable number of witnesses, the Parties put forward various contentions on such matters as whether the Mandate for South West Africa was still in force,—and if so, whether the Mandatory's obligation under Article 6 of the Mandate to furnish annual reports to the Council of the former League of Nations concerning its administration of the mandated territory had become transformed by one means or another into an obligation to furnish such reports to the General Assembly of the United Nations, or had, on the other hand, lapsed entirely;—whether there had been any contravention by the Respondent of the second paragraph of Article 2 of the Mandate which required the Mandatory to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory",—whether there had been any contravention of Article 4 of the Mandate, prohibiting (except for police and local defence purposes) the "military training of the natives", and forbidding the establishment of military or naval bases, or the erection of fortifications in the territory. The Applicants also alleged that the Respondent had contravened paragraph 1 of Article 7 of the Mandate (which provides that the Mandate can only be modified with the consent of the Council of the League

of Nations) by attempting to modify the Mandate without the consent of the General Assembly of the United Nations which, so it was contended, had replaced the Council of the League for this and other purposes. There were other allegations also, which it is not necessary to set out here.

4. On all these matters, the Court has studied the written pleadings and oral arguments of the Parties, and has also given consideration to the question of the order in which the various issues would fall to be dealt with. In this connection, there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings,—not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right or interest regarding the subject-matter of their claim, as set out in their final submissions.

5. Despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved. The same instruments are relevant to the existence and character of the Respondent's obligations concerning the Mandate as are also relevant to the existence and character of the Applicants' legal right or interest in that regard. Certain humanitarian principles alleged to affect the nature of the Mandatory's obligations in respect of the inhabitants of the mandated territory were also pleaded as a foundation for the right of the Applicants to claim in their own individual capacities the performance of those same obligations. The implications of Article 7, paragraph 1, of the Mandate, referred to above, require to be considered not only in connection with paragraph (9) and certain aspects of paragraph (2) of the Applicants' final submissions, but also, as will be seen in due course, in connection with that of the Applicants' standing relative to the merits of the case. The question of the position following upon the dissolution of the League of Nations in 1946 has the same kind of double aspect, and so do other matters.

6. The Parties having dealt with all the elements involved, it became the Court's duty to begin by considering those questions which had such a character that a decision respecting any of them might render unnecessary an enquiry into other aspects of the matter. There are two questions in the present case which have this character. One is whether the Mandate still subsists at all, as the Applicants maintain that it does in paragraph (1) of their final submissions; for if it does not, then clearly the various allegations of contraventions of the Mandate by the Respondent fall automatically to the ground. But this contention, namely as to the continued subsistence of the Mandate, is itself part of the Applicants' whole claim as put forward in their final submissions, being so put forward solely in connection with the remaining parts of the claim, and as the necessary foundation for these. For this reason the other question, which (as already mentioned) is that of the Appli-

cants' legal right or interest in the subject-matter of their claim, is even more fundamental.

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7. It is accordingly to this last question that the Court must now turn. Before doing so however, it should be made clear that when, in the present Judgment, the Court considers what provisions of the Mandate for South West Africa involve a legal right or interest for the Applicants, and what not, it does so without pronouncing upon, and wholly without prejudice to, the question of whether that Mandate is still in force. The Court moreover thinks it necessary to state that its 1962 decision on the question of competence was equally given without prejudice to that of the survival of the Mandate, which is a question appertaining to the merits of the case. It was not in issue in 1962, except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court. It was made clear in the course of the 1962 proceedings that it was upon this assumption that the Respondent was arguing the jurisdictional issue; and the same view is reflected in the Applicants' final submissions (1) and (2) in the present proceedings, the effect of which is to ask the Court to declare *(inter alia)* that the Mandate still subsists, and that the Respondent is still subject to the obligations it provides for. It is, correspondingly, a principal part of the Respondent's case on the merits that since (as it contends) the Mandate no longer exists, the Respondent has no obligations under it, and therefore cannot be in breach of the Mandate. This is a matter which, for reasons to be given later in another connection, but equally applicable here, could not have been the subject of any final determination by a decision on a purely preliminary point of jurisdiction.

8. The Respondent's final submissions in the present proceedings ask simply for a rejection of those of the Applicants, both generally and in detail. But quite apart from the recognized right of the Court, implicit in paragraph 2 of Article 53 of its Statute, to select *proprio motu* the basis of its decision, the Respondent did in the present phase of the case, particularly in its written pleadings, deny that the Applicants had any legal right or interest in the subject-matter of their claim,—a denial which, at this stage of the case, clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate. In its final submissions the Respondent asks the Court, upon the basis, *inter alia*, of "the statements of fact and law as set forth in [its] pleadings and the oral proceedings", to make no declaration as claimed by the Applicants in their final submissions.

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9. The Court now comes to the basis of its decision in the present proceedings. In order to lead up to this, something must first be said about the structure characterizing the Mandate for South West Africa,

in common with the other various mandates; and here it is necessary to stress that no true appreciation of the legal situation regarding any particular mandate, such as that for South West Africa, can be arrived at unless it is borne in mind that this Mandate was only one amongst a number of mandates, the Respondent only one amongst a number of mandatories, and that the salient features of the mandates system as a whole were, with exceptions to be noted where material, applicable indifferently to all the mandates. The Mandate for South West Africa was not a special case.

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10. The mandates system, as is well known, was formally instituted by Article 22 of the Covenant of the League of Nations. As there indicated, there were to be three categories of mandates, designated as 'A', 'B' and 'C' mandates respectively, the Mandate for South West Africa being one of the 'C' category. The differences between these categories lay in the nature and geographical situation of the territories concerned, the state of development of their peoples, and the powers accordingly to be vested in the administering authority, or mandatory, for each territory placed under mandate. But although it was by Article 22 of the League Covenant that the system as such was established, the precise terms of each mandate, covering the rights and obligations of the mandatory, of the League and its organs, and of the individual members of the League, in relation to each mandated territory, were set out in separate instruments of mandate which, with one exception to be noted later, took the form of resolutions of the Council of the League.

11. These instruments, whatever the differences between certain of their terms, had various features in common as regards their structure. For present purposes, their substantive provisions may be regarded as falling into two main categories. On the one hand, and of course as the principal element of each instrument, there were the articles defining the mandatory's powers, and its obligations in respect of the inhabitants of the territory and towards the League and its organs. These provisions, relating to the carrying out of the mandates as mandates, will hereinafter be referred to as "conduct of the mandate", or simply "conduct" provisions. On the other hand, there were articles conferring in different degrees, according to the particular mandate or category of mandate, certain rights relative to the mandated territory, directly upon the members of the League as individual States, or in favour of their nationals. Many of these rights were of the same kind as are to be found in certain provisions of ordinary treaties of commerce, establishment and navigation concluded between States. Rights of this kind will hereinafter be referred to as "special interests" rights, embodied in the "special interests" provisions of the mandates. As regards the 'A' and 'B' mandates (particularly the latter) these rights were numerous and figured prominently—a fact which, as will be seen later, is significant for the case of the 'C' mandates also, even though, in the latter case,

they were confined to provisions for freedom for 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"—(Mandate for South West Africa, Article 5). In the present case, the dispute between the Parties relates exclusively to the former of these two categories of provisions, and not to the latter.

12. The broad distinction just noticed was a genuine, indeed an obvious one. Even if it may be the case that certain provisions of some of the mandates (such as for instance the "open door" provisions of the 'A' and 'B' mandates) can be regarded as having a double aspect, this does not affect the validity or relevance of the distinction. Such provisions would, in their "conduct of the mandate" aspect, fall under that head; and in their aspect of affording commercial opportunities for members of the League and their nationals, they would come under the head of "special interests" clauses. It is natural that commercial provisions of this kind could redound to the benefit of a mandated territory and its inhabitants in so far as the use made of them by States members of the League had the effect of promoting the economic or industrial development of the territory. In that sense and to that extent these provisions could no doubt contribute to furthering the aims of the mandate; and their due implementation by the mandatories was in consequence a matter of concern to the League and its appropriate organs dealing with mandates questions. But this was incidental, and was never their primary object. Their primary object was to benefit the individual members of the League and their nationals. Any action or intervention on the part of member States in this regard would be for that purpose—not in furtherance of the mandate as such.

13. In addition to the classes of provisions so far noticed, every instrument of mandate contained a jurisdictional clause which, with a single exception to be noticed in due course, was in identical terms for each mandate, whether belonging to the 'A', 'B' or 'C' category. The language and effect of this clause will be considered later; but it provided for a reference of disputes to the Permanent Court of International Justice and, so the Court found in the first phase of the case, as already mentioned, this reference was now, by virtue of Article 37 of the Court's Statute, to be construed as a reference to the present Court. Another feature of the mandates generally, was a provision according to which their terms could not be modified without the consent of the Council of the League. A further element, though peculiar to the 'C' mandates, may be noted: it was provided both by Article 22 of the Covenant of the League and by a provision of the instruments of 'C' mandates that, subject to certain conditions not here material, a 'C' mandatory was to administer the mandated territory "as an integral portion of its own territory".

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14. Having regard to the situation thus outlined, and in particular to the distinction to be drawn between the "conduct" and the "special interests" provisions of the various instruments of mandate, the question which now arises for decision by the Court is whether any legal right or interest exists for the Applicants relative to the Mandate, apart from such as they may have in respect of the latter category of provisions; —a matter on which the Court expresses no opinion, since this category is not in issue in the present case. In respect of the former category—the "conduct" provisions—the question which has to be decided is whether, according to the scheme of the mandates and of the mandates system as a whole, any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually and each in its own separate right to call for the carrying out of the mandates as regards their "conduct" clauses;—or whether this function must, rather, be regarded as having appertained exclusively to the League itself, and not to each and every member State, separately and independently. In other words, the question is whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates.

15. If the answer to be given to this question should have the effect that the Applicants cannot be regarded as possessing the legal right or interest claimed, it would follow that even if the various allegations of contraventions of the Mandate for South West Africa on the part of the Respondent were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they ask the Court to make. This is no less true in respect of their final submissions (1) and (2) than of the others. In these two submissions, the Applicants in substance affirm, and ask the Court to declare, the continued existence of the Mandate and of the Respondent's obligations thereunder. In the present proceedings however, the Court is concerned with the final submissions of the Applicants solely in the context of the "conduct" provisions of the Mandate. It has not to pronounce upon any of the Applicants' final submissions as these might relate to any question of "special interests" if a claim in respect of these had been made. The object of the Applicants' submissions (1) and (2) is to provide the basis for their remaining submissions, which are made exclusively in the context of a claim about provisions concerning which the question immediately arises whether they are provisions in respect of which the Applicants have any legal right or interest. If the Court finds that the Applicants do have such a right or interest, it would then be called upon to pronounce upon the first of the Applicants' final submissions—(continued existence of the Mandate), since if that one should be rejected, the rest would automatically fall to the ground. If on the other hand the Court should find that such a right or interest does not exist, it would obviously be inappropriate and misplaced to make any pronouncement on this first submission of the Applicants, or

on the second, since in the context of the present case the question of the continued existence of the Mandate, and of the Respondent's obligations thereunder, would arise solely in connection with provisions concerning which the Court had found that the Applicants lacked any legal right or interest.

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16. It is in their capacity as former members of the League of Nations that the Applicants appear before the Court; and the rights they claim are those that the members of the League are said to have been invested with in the time of the League. Accordingly, in order to determine what the rights and obligations of the Parties relative to the Mandate were and are (supposing it still to be in force, but without prejudice to that question); and in particular whether (as regards the Applicants) these include any right individually to call for the due execution of the "conduct" provisions, and (for the Respondent) an obligation to be answerable to the Applicants in respect of its administration of the Mandate, the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant. Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at. This view is supported by a previous finding of the Court (*Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, at p. 189), the effect of which is that the meaning of a juridical notion in a historical context, must be sought by reference to the way in which that notion was understood in that context.

17. It follows that any enquiry into the rights and obligations of the Parties in the present case must proceed principally on the basis of considering, in the setting of their period, the texts of the instruments and particular provisions intended to give juridical expression to the notion of the "sacred trust of civilization" by instituting a mandates system.

18. The enquiry must pay no less attention to the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system was organized, and which inevitably determined how this system was to operate,—by what methods, —through what channels,—and by means of what recourses. One fundamental element of this juridical character and structure, which in a sense governed everything else, was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council,

with a permanent Secretariat". If the action of the League as a whole was thus governed, it followed naturally that the individual member States could not themselves act differently relative to League matters, unless it was otherwise specially so provided by some article of the Covenant.

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19. As is well known, the mandates system originated in the decision taken at the Peace Conference following upon the world war of 1914-1918, that the colonial territories over which, by Article 119 of the Treaty of Versailles, Germany renounced "all her rights and titles" in favour of the then Principal Allied and Associated Powers, should not be annexed by those Powers or by any country affiliated to them, but should be placed under an international régime, in the application to the peoples of those territories, deemed "not yet able to stand by themselves", of the principle, declared by Article 22 of the League Covenant, that their "well-being and development" should form "a sacred trust of civilization".

20. The type of régime specified by Article 22 of the Covenant as constituting the "best method of giving practical effect to this principle" was that "the tutelage of such peoples should be entrusted to advanced nations ... who are willing to accept it",—and here it was specifically added that it was to be "on behalf of the League" that "this tutelage should be exercised by those nations as Mandatories". It was not provided that the mandates should, either additionally or in the alternative, be exercised on behalf of the members of the League in their individual capacities. The mandatories were to be the agents of, or trustees for the League,—and not of, or for, each and every member of it individually.

21. The same basic idea was expressed again in the third paragraph of the preamble to the instrument of mandate for South West Africa, where it was recited that the Mandatory, in agreeing to accept the Mandate, had undertaken "to exercise it on behalf of the League of Nations". No other behalf was specified in which the Mandatory had undertaken, either actually or potentially, to exercise the Mandate. The effect of this recital, as the Court sees it, was to register an implied recognition *(a)* on the part of the Mandatory of the right of the League, acting as an entity through its appropriate organs, to require the due execution of the Mandate in respect of its "conduct" provisions; and *(b)* on the part of both the Mandatory and the Council of the League, of the character of the Mandate as a juridical régime set within the framework of the League as an institution. There was no similar recognition of any right as being additionally and independently vested in any other entity, such as a State, or as existing outside or independently of the League as an institution; nor was any undertaking at all given by the Mandatory in that regard.

22. It was provided by paragraph 1 of Article 22 of the Covenant that "securities for the performance" of the sacred trust were to be "embodied

in this Covenant". This important reference to the "performance" of the trust contemplated, as it said, securities to be afforded by the Covenant itself. By paragraphs 7 and 9 respectively of Article 22, every mandatory was to "render to the Council [of the League—not to any other entity] an annual report in reference to the territory committed to its charge"; and a permanent commission, which came to be known as the Permanent Mandates Commission, was to be constituted "to receive and examine" these annual reports and "to advise the Council on all matters relating to the observance of the mandates". The Permanent Mandates Commission alone had this advisory role, just as the Council alone had the supervisory function. The Commission consisted of independent experts in their own right, appointed in their personal capacity as such, not as representing any individual member of the League or the member States generally.

23. The obligation to furnish annual reports was reproduced in the instruments of mandate themselves, where it was stated that they were to be rendered "to the satisfaction of the Council". Neither by the Covenant nor by the instruments of mandate, was any role reserved to individual League members in respect of these reports, furnishable to the Council, and referred by it to the Permanent Mandates Commission. It was the Council that had to be satisfied, not the individual League members. The part played by the latter, other than such as were members of the Council, was exclusively through their participation in the work of the Assembly of the League when, acting under Article 3 of the Covenant, that organ exercised in respect of mandates questions its power to deal with "any matter within the sphere of action of the League". It was as being within the sphere of the League as an institution that mandates questions were dealt with by its Assembly.

24. These then were the methods, and the only methods, contemplated by the Covenant as "securities" for the performance of the sacred trust, and it was in the Covenant that they were to be embodied. No security taking the form of a right for every member of the League separately and individually to require from the mandatories the due performance of their mandates, or creating a liability for each mandatory to be answerable to them individually,—still less conferring a right of recourse to the Court in these regards,—was provided by the Covenant.

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25. This result is precisely what was to be expected from the fact that the mandates system was an activity of the League of Nations, that is to say of an entity functioning as an institution. In such a setting, rights cannot be derived from the mere fact of membership of the organization in itself: the rights that member States can legitimately claim must be derived from and depend on the particular terms of the instrument constitutive of the organization, and of the other instruments relevant

in the context. This principle is necessarily applicable as regards the question of what rights member States can claim in respect of a régime such as results from the mandates system, functioning within the framework of the organization. For this reason, and in this setting, there could, as regards the carrying out of the "conduct" provisions of the various mandates, be no question of any legal tie between the mandatories and other individual members. The sphere of authority assigned to the mandatories by decisions of the organization could give rise to legal ties only between them severally, as mandatories, and the organization itself. The individual member States of the organization could take part in the administrative process only through their participation in the activities of the organs by means of which the League was entitled to function. Such participation did not give rise to any right of direct intervention relative to the mandatories: this was, and remained, the prerogative of the League organs.

26. On the other hand, this did not mean that the member States were mere helpless or impotent spectators of what went on, or that they lacked all means of recourse. On the contrary, as members of the League Assembly, or as members of the League Council, or both, as the case might be, they could raise any question relating to mandates generally, or to some one mandate in particular, for consideration by those organs, and could, by their participation, influence the outcome. The records both of the Assembly and of other League organs show that the members of the League in fact made considerable use of this faculty. But again, its exercise—always through the League—did not confer on them any separate right of direct intervention. Rather did it bear witness to the absence of it.

27. Such is the background against which must be viewed the provisions by which the authority of the various mandatories was defined, and which the Court will now proceed to consider.

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28. By paragraph 8 of Article 22 of the Covenant, it was provided that the "degree of authority, control or administration" which the various mandatories were to exercise, was to be "explicitly defined in each case by the Council", if these matters had not been "previously agreed upon by the Members of the League". The language of this paragraph was reproduced, in effect textually, in the fourth paragraph of the preamble to the Mandate for South West Africa, which the League Council itself inserted, thus stating the basis on which it was acting in adopting the resolution of 17 December 1920, in which the terms of mandate were set out. Taken by itself this necessarily implied that these terms had not been "previously agreed upon by the Members of the League". There is however some evidence in the record to indicate that in the context of the mandates, the allusion to agreement on the part of "the Members of the League" was regarded at the time as referring only to the five Principal Allied and Associated Powers engaged in the drafting; but this

of course could only lend emphasis to the view that the members of the League generally were not considered as having any direct concern with the setting up of the various mandates; and the record indicates that they were given virtually no information on the subject until a very late stage.

29. There is also evidence that the delays were due to difficulties over certain of the commercial aspects of the mandates, but that the Principal Powers had already decided that the mandates should in any event be issued by the Council of the League, thereby giving them a definitely institutional basis. Preliminary and private negotiations and consideration of drafts by member States, or certain of them, is a normal way of leading up to the resolutions adopted by an international organ, and in no way affects their character as eventually adopted. Accordingly the League Council proceeded to issue the Mandate which, being in the form of a resolution, did not admit of those processes of separate signature and ratification generally utilized at the time in all cases where participation on a "party" basis was intended. This method was common to all the mandates, except the 'A' mandate for Iraq which, significantly, was embodied in a series of treaties between the United Kingdom, as Mandatory, and Iraq. No other member of the League was a party to these treaties. It was to the League Council alone that the United Kingdom Government reported concerning the conclusion of these treaties, and to which it gave assurances that the general pattern of their contents would be the same as for the other mandates.

30. Nor did even the Principal Allied and Associated Powers as a group have the last word on the drafting of the Mandate. This was the Council's. In addition to the insertion as already mentioned, of the fourth paragraph of the preamble, the Council made a number of alterations in the draft before finally adopting it. One of these is significant in the present context. Unlike the final version of the jurisdictional clause of the Mandate as issued by the Council and adopted for all the mandates, by which the Mandatory alone undertook to submit to adjudication in the event of a dispute with another member of the League, the original version would have extended the competence of the Court equally to disputes referred to it by the Mandatory as plaintiff, as well as to disputes arising between other members of the League *inter se*. The reason for the change effected by the Council is directly relevant to what was regarded as being the status of the individual members of the League in relation to the Mandate. This reason was that, as was soon perceived, an obligation to submit to adjudication could not be imposed upon them without their consent. But of course, had they been regarded as "parties" to the instrument of Mandate, as if to a treaty, they would thereby have been held to have given consent to all that it contained, including the jurisdictional clause. Clearly they were not so regarded.

31. Another circumstance calling for notice is that, as mentioned earlier, the Mandate contained a clause—paragraph 1 of Article 7 (and similarly in the other mandates)—providing that the consent of the Council of the League was required for any modification of the terms of the Mandate; but it was not stated that the consent of individual members of the League was additionally required. There is no need to enquire whether, in particular cases—for instance for the modification of any of their "special interests" under the mandate—the consent of the member States would have been necessary, since what is now in question is the "conduct" provisions. As to these, the special position given to the Council of the League by paragraph 1 of Article 7 confirms the view that individual member States were not regarded as having a separate legal right or interest of their own respecting the administration of the Mandate. It is certainly inconsistent with the view that they were considered as separate parties to the instrument of mandate.

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32. The real position of the individual members of the League relative to the various instruments of mandate was a different one. They were not parties to them; but they were, to a limited extent, and in certain respects only, in the position of deriving rights from these instruments. Not being parties to the instruments of mandate, they could draw from them only such rights as these unequivocally conferred, directly or by a clearly necessary implication. The existence of such rights could not be presumed or merely inferred or postulated. But in Article 22 of the League Covenant, only the mandatories are mentioned in connection with the carrying out of the mandates in respect of the inhabitants of the mandated territories and as regards the League organs. Except in the procedural provisions of paragraph 8 (the "if not previously agreed upon" clause) the only mention of the members of the League in Article 22 is in quite another context, namely at the end of paragraph 5, where it is provided that the mandatories shall "also secure equal opportunities for the trade and commerce of other Members of the League". It is the same in the instruments of mandate. Apart from the jurisdictional clause, which will be considered later, mention of the members of the League is made only in the "special interests" provisions of these instruments. It is in respect of these interests alone that any direct link is established between the mandatories and the members of the League individually. In the case of the "conduct" provisions, mention is made only of the mandatory and, where required, of the appropriate organ of the League. The link in respect of these provisions is with the League or League organs alone.

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33. Accordingly, viewing the matter in the light of the relevant texts and instruments, and having regard to the structure of the League,

within the framework of which the mandates system functioned, the Court considers that even in the time of the League, even as members of the League when that organization still existed, the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the "sacred trust". This right was vested exclusively in the League, and was exercised through its competent organs. Each member of the League could share in its collective, institutional exercise by the League, through their participation in the work of its organs, and to the extent that these organs themselves were empowered under the mandates system to act. By their right to activate these organs (of which they made full use), they could procure consideration of mandates questions as of other matters within the sphere of action of the League. But no right was reserved to them, individually as States, and independently of their participation in the institutional activities of the League, as component parts of it, to claim in their own name,—still less as agents authorized to represent the League,—the right to invigilate the sacred trust,—to set themselves up as separate custodians of the various mandates. This was the role of the League organs.

34. To put this conclusion in another way, the position was that under the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League—in particular to its Council—and were not additionally and separately responsible to each and every individual State member of the League. If the latter had been given a legal right or interest on an individual "State" basis, this would have meant that each member of the League, independently of the Council or other competent League organ, could have addressed itself directly to every mandatory, for the purpose of calling for explanations or justifications of its administration, and generally to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose.

35. Clearly no such right existed under the mandates system as contemplated by any of the relevant instruments. It would have involved a position of accountability by the mandatories to each and every member of the League separately, for otherwise there would have been nothing additional to the normal faculty of participating in the collective work of the League respecting mandates. The existence of such an additional right could not however be reconciled with the way in which the obligation of the mandatories, both under Article 22 of the League Covenant, and (in the case of South West Africa) Article 6 of the instrument of Mandate, was limited to reporting to the League Council,

and to its satisfaction alone. Such a situation would have been particularly unimaginable in relation to a system which, within certain limits, allowed the mandatories to determine for themselves by what means they would carry out their mandates: and *a fortiori* would this have been so in the case of a 'C' mandate, having regard to the special power of administration as "an integral portion of its own territory" which, as already noted, was conferred upon the mandatory respecting this category of mandate.

36. The foregoing conclusions hold good whether the League is regarded as having possessed the kind of corporate juridical personality that the Court, in its Advisory Opinion in the case of *Reparation for Injuries Suffered in the Service of the United Nations* (*I.C.J. Reports 1949*, p. 174), found the United Nations to be invested with,—or whether the League is regarded as a collectivity of States functioning on an institutional basis, whose collective rights in respect of League matters were, as Article 2 of the Covenant implied, exercisable only through the appropriate League organs, and not independently of these.

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37. In order to test the conclusions thus reached, it is legitimate to have regard to the probable consequences of the view contended for by the Applicants,—or at any rate to the possibilities that would have been opened up if each member of the League had individually possessed the standing and rights now claimed. One question which arises is that of how far the individual members of the League would have been in a position to play the role ascribed to them. The Applicants, as part of their argument in favour of deeming the functions previously discharged by the Council of the League to have passed now to the General Assembly of the United Nations, insisted on the need for "informed" dealings with the Mandatory: only a body sufficiently endowed with the necessary knowledge, experience and expertise could, it was said, adequately discharge the supervisory role. Yet at the same time it was contended that individual members of the League,—not directly advised by the Permanent Mandates Commission,—not (unless members of the Council) in touch with the mandates questions except through their participation in the work of the League Assembly,—nevertheless possessed a right independently to confront the various mandatories over their administration of the mandates, and a faculty to call upon them to alter their policies and adjust their courses accordingly. The two contentions are inconsistent, and the second affronts all the probabilities.

38. No less difficult than the position of a mandatory caught between a number of possible different expressions of view, would have been

that of the League Council whose authority must have been undermined, and its action often frustrated, by the existence of some 40 or 50 independent centres of invigilatory rights.

39. Equally inconsistent would the position claimed for individual League members have been with that of the mandatory as a member of the Council on mandates questions. As such, the mandatory, on the basis of the normal League voting rule, and by virtue of Article 4, paragraphs 5 and 6, and Article 5, paragraph 1, of the Covenant, possessed a vote necessary to the taking of any formal Council decision on a question of substance relative to its mandate (at least in the sense that, if cast, it must not be adversely cast); so that, in the last resort, the assent, or non-dissent, of the mandatory had to be negotiated.

40. In the opinion of the Court, those who intended the one system cannot simultaneously have intended the other: and if in the time of the League,—if as members of the League,—the Applicants did not possess the rights contended for,—evidently they do not possess them now. There is no principle of law which, following upon the dissolution of the League, would operate to invest the Applicants with rights they did not have even when the League was still in being.

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41. The Court will now turn to the various contentions that have been or might be advanced in opposition to the view it takes; and will first deal with a number of points which have a certain general affinity.

42. Firstly, it may be represented that the consequences described above as being rendered possible if individual members of the League had had the rights now contended for by the Applicants, are unreal,—because the true position under the mandates system was that, even if in all normal circumstances the mandatories were responsible to the Council of the League alone, nevertheless the individual members of the League possessed a right of last resort to activate the Court under the jurisdictional clause if any mandate was being contravened. The Court will consider the effect of the jurisdictional clause later; but quite apart from that, the argument is misconceived. It is evident that any such right would have availed nothing unless the members of the League had individually possessed substantive rights regarding the carrying out of the mandates which they could make good before the Court, if and when they did activate it. If, however, they possessed such rights then, as already noted, irrespective of whether they went to the Court or not, they were entitled at all times, outside League channels, to confront the mandatories over the administration of their mandates, just as much as in respect of their "special interests" under the mandate. The theory that the members of

the League possessed such rights, but were precluded from exercising them unless by means of recourse to adjudication, constitutes an essentially improbable supposition for which the relevant texts afford no warrant. These texts did not need to impose any such limitation, for the simple reason that they did not create the alleged rights.

43. Again, it has been pointed out that there is nothing unprecedented in a situation in which the supervision of a certain matter is, on the political plane, entrusted to a given body or organ, but where certain individual States—not all of them necessarily actual parties to the instruments concerned—have parallel legal rights in regard to the same matter, which they can assert in specified ways. This is true but irrelevant, since for the present purposes the question is not whether such rights could be, but whether they were in fact conferred. In various instances cited by way of example, not only was the intention to confer the right and its special purpose quite clear,—it was also restricted to a small group of States, members, either permanent or elected, of the supervisory organ concerned. In such a case, the right granted was, in effect, part of the institutional or conventional machinery of control, and its existence could occasion no difficulty or confusion. This type of case, which will be further discussed later, in connection with the jurisdictional clause of the mandates, is not the same as the present one.

44. Next, it may be said that a legal right or interest need not necessarily relate to anything material or "tangible", and can be infringed even though no prejudice of a material kind has been suffered. In this connection, the provisions of certain treaties and other international instruments of a humanitarian character, and the terms of various arbitral and judicial decisions, are cited as indicating that, for instance, States may be entitled to uphold some general principle even though the particular contravention of it alleged has not affected their own material interests;—that again, States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages. Without attempting to discuss how far, and in what particular circumstances, these things might be true, it suffices to point out that, in holding that the Applicants in the present case could only have had a legal right or interest in the "special interests" provisions of the Mandate, the Court does not in any way do so merely because these relate to a material or tangible object. Nor, in holding that no legal right or interest exists for the Applicants, individually as States, in respect of the "conduct" provisions, does the Court do so because any such right or interest would not have a material or tangible object. The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law;—and that in the present case, none were ever vested in individual members of the League under any of the relevant instruments, or as a

constituent part of the mandates system as a whole, or otherwise.

45. Various miscellaneous propositions are also advanced: the Mandate is more deserving of protection than the "special interests" of any particular State;—there would be nothing extraordinary in a State having a legal right to vindicate a purely altruistic interest;—and so forth. But these are not really legal propositions: they do not eliminate the need to find the particular provisions or rules of law the existence of which they assume, but do not of themselves demonstrate.

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46. It is also asked whether, even supposing that the Applicants only had an interest on the political level respecting the conduct of the Mandate, this would not have sufficed to enable them to seek a declaration from the Court as to what the legal position was under the Mandate, so that, for instance, they could know whether they would be on good ground in bringing before the appropriate political organs, acts of the mandatory thought to involve a threat to peace or good international relations.

47. The Court is concerned in the present proceedings only with the rights which the Applicants had as former members of the League of Nations—for it is in that capacity alone that they are now appearing. If the contention above described is intended to mean that because, for example, the Applicants would, under paragraph 2 of Article 11 of the League Covenant, have had "the friendly right . . . to bring to the attention of the Assembly or of the Council any circumstance . . . which threatens to disturb international peace or the good understanding . . . upon which peace depends", they would therefore also—and on that account—have had the right to obtain a declaration from the Court as to what the mandatory's obligations were, and whether a violation of these had occurred;—if this is the contention, the Court can only reply to it in the negative. A provision such as Article 11 of the Covenant could at most furnish a motive why the Applicants (or other members of the League) might wish to know what the legal position was. It could not of itself give them any right to procure this knowledge from the Court which they would not otherwise have had under the Mandate itself.

48. On the other hand, an appropriate organ of the League such as the Council could of course have sought an advisory opinion from the Court on any such matter. It is in this connection that the chief objection to the theory under discussion arises. Under the Court's Statute as it is at present framed, States cannot obtain mere "opinions" from the Court. This faculty is reserved to certain international organs empowered to exercise it by way of the process of requesting the Court for an advisory opinion. It was open to the Council of the League to make use of this process in case of any doubt as to the rights of the League or its

members relative to mandates. But in their individual capacity, States can appear before the Court only as litigants in a dispute with another State, even if their object in so doing is only to obtain a declaratory judgment. The moment they so appear however, it is necessary for them, even for that limited purpose, to establish, in relation to the defendant party in the case, the existence of a legal right or interest in the subject-matter of their claim, such as to entitle them to the declarations or pronouncements they seek: or in other words that they are parties to whom the defendant State is answerable under the relevant instrument or rule of law.

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49. The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.

50. Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character.

51. It is in the light of these considerations that the Court must examine what is perhaps the most important contention of a general character that has been advanced in connection with this aspect of the case, namely the contention by which it is sought to derive a legal right or interest in the conduct of the mandate from the simple existence, or principle, of the "sacred trust". The sacred trust, it is said, is a "sacred trust of civilization". Hence all civilized nations have an interest in seeing that it is carried out. An interest, no doubt;—but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. One such form might be the United Nations trusteeship system,—another, as contained in Chapter XI of the Charter concerning non-self-governing territories, which makes express reference to "a sacred trust". In each case the legal rights and obligations are those, and only those, provided for by the relevant texts, whatever these may be.

52. In the present case, the principle of the sacred trust has as its sole

juridical expression the mandates system. As such, it constitutes a moral ideal given form as a juridical régime in the shape of that system. But it is necessary not to confuse the moral ideal with the legal rules intended to give it effect. For the purpose of realizing the aims of the trust in the particular form of any given mandate, its legal rights and obligations were those, and those alone, which resulted from the relevant instruments creating the system, and the mandate itself, within the framework of the League of Nations.

53. Thus it is that paragraph 2 of Article 22 of the Covenant, in the same breath that it postulates the principle of the sacred trust, specifies in terms that, in order to give "effect to this principle", the tutelage of the peoples of the mandated territories should be entrusted to certain nations, "and that this tutelage should be exercised by them" as mandatories "on behalf of the League". It was from this that flowed all the legal consequences already noticed.

54. To sum up, the principle of the sacred trust has no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole; and, within the system equally, such rights and obligations exist only in so far as there is actual provision for them. Once the expression to be given to an idea has been accepted in the form of a particular régime or system, its legal incidents are those of the régime or system. It is not permissible to import new ones by a process of appeal to the originating idea—a process that would, *ex hypothesi*, have no natural limit. Hence, although, as has constantly been reiterated, the members of the League had an interest in seeing that the obligations entailed by the mandates system were respected, this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs, and not individually.

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55. Next, it may be suggested that even if the legal position of the Applicants and of other individual members of the League of Nations was as the Court holds it to be, this was so only during the lifetime of the League, and that when the latter was dissolved, the rights previously resident in the League itself, or in its competent organs, devolved, so to speak, upon the individual States which were members of it at the date of its dissolution. There is, however, no principle of law which would warrant such a conclusion. Although the Court held in the earlier 1962 phase of the present case that the members of a dissolved international organization can be deemed, though no longer members of it, to retain rights which, as members, they individually possessed when the organization was in being, this could not extend to ascribing to them, upon and by reason of the dissolution, rights which, even previously as members, they never did individually possess. Nor of

course could anything that occurred subsequent to the dissolution of the League operate to invest its members with rights they did not, in that capacity, previously have,—and it is the rights which they had as members of the League that are now in question.

56. The Court can equally not read the unilateral declarations, or statements of intention as they have been called, which were made by the various mandatories on the occasion of the dissolution of the League, expressing their willingness to continue to be guided by the mandates in their administration of the territories concerned, as conferring on the members of the League individually any new legal rights or interests of a kind they did not previously possess.

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57. Another argument which requires consideration is that in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the Mandate, it must be unacceptable. Without attempting in any way to pronounce on the various implications involved in this argument, the Court thinks the inference sought to be drawn from it is inadmissible. If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law.

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58. The Court comes now to a more specific category of contention arising out of the existence and terms of the jurisdictional clause of the Mandate, and of the effect of the Court's Judgment of 21 December 1962 in that regard. The Court's present Judgment is founded on the relevant provisions of the Covenant of the League of Nations, the character of the League as an organization, and the substantive provisions of the instrument of Mandate for South West Africa. The question now to be considered is whether there is anything arising out of its previous Judgment, or the terms of the jurisdictional clause of the Mandate, which should lead the Court to modify the conclusions arrived at on those foundations.

59. In the first place, it is contended that the question of the Applicants' legal right or interest was settled by that Judgment and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term,—whether it ranks as a "decision" for the purposes of Article 59 of the Court's

Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection. When preliminary objections are entered by the defendant party in a case, the proceedings on the merits are, by virtue of Article 62, paragraph 3, of the Court's Rules, suspended. Thereafter, and until the proceedings on the merits are resumed, the preliminary objections having been rejected, there can be no decision finally determining or pre-judging any issue of merits. It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved.

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60. It is however contended that, even if the Judgment of 1962 was, for the above-mentioned reasons, not preclusive of the issue of the Applicants' legal right or interest, it did in essence determine that issue because it decided that the Applicants were entitled to invoke the jurisdictional clause of the Mandate, and that if they had a sufficient interest to do that, they must also have a sufficient interest in the subject-matter of their claim. This view is not well-founded. The faculty of invoking a jurisdictional clause depends upon what tests or conditions of the right to do so are laid down by the clause itself. To hold that the parties in any given case belong to the category of State specified in the clause,—that the dispute has the specified character,—and that the forum is the one specified,—is not the same thing as finding the existence of a legal right or interest relative to the merits of the claim. The jurisdictional clause of the Mandate for South West Africa (Article 7, paragraph 2), which appeared in all the mandates, reads as follows:

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

Looking at this provision; assuming the existence of a dispute; assuming that negotiations had taken place; that these had not settled the dispute; and that the Court was, by the operation of Article 37 of its Statute, duly substituted for the Permanent Court as the competent forum (all of which assumptions would be in accordance with the Court's

Judgment of 1962);—then all that the Applicants had to do in order to bring themselves under this clause and establish their capacity to invoke it, was to show *(a) ratione personae*, that they were members of the League, constructively if not actually, or must be deemed still so to be for the purposes of this provision, notwithstanding the dissolution of the League; and *(b) ratione materiae*, that the dispute did relate to the interpretation or application of one or more provisions of the Mandate. If the Court considered that these requirements were satisfied, it could assume jurisdiction to hear and determine the merits without going into the question of the Applicants' legal right or interest relative to the subject-matter of their claim; for the jurisdictional clause did not, according to its terms, require them to establish the existence of such a right or interest for the purpose of founding the competence of the Court.

61. Hence, whatever observations the Court may have made on that matter, it remained for the Applicants, on the merits, to establish that they had this right or interest in the carrying out of the provisions which they invoked, such as to entitle them to the pronouncements and declarations they were seeking from the Court. Since decisions of an interlocutory character cannot pre-judge questions of merits, there can be no contradiction between a decision allowing that the Applicants had the capacity to invoke the jurisdictional clause—this being the only question which, so far as this point goes, the Court was then called upon to decide, or could decide,—and a decision that the Applicants have not established the legal basis of their claim on the merits.

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62. It is next contended that this particular jurisdictional clause has an effect which is more extensive than if it is considered as a simple jurisdictional clause: that it is a clause conferring a substantive right,—that the substantive right it confers is precisely the right to claim from the Mandatory the carrying out of the "conduct of the Mandate" provisions of the instrument of mandate,—and that in consequence, even if the right is derivable from no other source, it is derivable from and implicit in this clause.

63. Let it be observed first of all that it would be remarkable if this were the case,—that is to say if so important a right, having such potentially far-reaching consequences,—intended, so the Applicants contend, to play such an essential role in the scheme of the Mandate—of all the mandates, and of the system generally—had been created indirectly, and in so casual and almost incidental a fashion, by an ordinary jurisdictional clause, lacking as will shortly be seen in any of the special features that might give it the effect claimed,—and which would certainly be requisite in order to achieve that effect. The Court considers it highly unlikely that, given the far-reaching consequences involved and, according to the Applicants, intended, the framers of the mandates system, had

they had any such intention, would have chosen this particular type of jurisdictional clause as the method of carrying it out.

64. In truth however, there is nothing about this particular jurisdictional clause to differentiate it from many others, or to make it an exception to the rule that, in principle, jurisdictional clauses are adjectival not substantive in their nature and effect. It is of course possible to introduce into such a clause extra paragraphs or phrases specifically conveying substantive rights or imposing substantive obligations; but the particular section of any clause which provides for recourse to an indicated forum, on the part of a specified category of litigant, in relation to a certain kind of dispute—or those words in it which provide this—cannot simultaneously and *per se* invest the parties with the substantive rights the existence of which is exactly what they will have to demonstrate in the forum concerned, and which it is the whole object of the latter to determine. It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim,—and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court.

65. In the present case, that subject-matter includes the question whether the Applicants possess any legal right to require the performance of the "conduct" provisions of the Mandate. This is something which cannot be predetermined by the language of a common-form jurisdictional clause such as Article 7, paragraph 2, of the Mandate for South West Africa. This provision, with slight differences of wording and emphasis, is in the same form as that of many other jurisdictional clauses. The Court can see nothing in it that would take the clause outside the normal rule that, in a dispute causing the activation of a jurisdictional clause, the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it,—and must therefore be established *aliunde vel aliter*. Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal.

66. Such rights may be derived from participation in an international instrument by a State which has signed and ratified, or has acceded, or has in some other manner become a party to it; and which in consequence, and subject to any exceptions expressly indicated, is entitled to enjoy rights under all the provisions of the instrument concerned. Since the Applicants cannot bring themselves under this head, they must show that the "conduct" provisions of the mandates conferred rights in terms on members of the League as individual States, in the same way that the "special interests" provisions did. It is however contended that there is a third possibility, and that on the basis of the jurisdictional clause alone, the Applicants, as members of the League, were part of the institutional machinery of control relative to the man-

dates, and that in this capacity they had a right of action of the same kind as, for instance, members of the League Council had under the jurisdictional clauses of the minorities treaties of that period, for the protection of minority rights. On this footing the essence of the contention is that the Applicants do not need to show the existence of any substantive rights outside the jurisdictional clause, and that they had—that all members of the League had—what was in effect a policing function under the mandates and by virtue of the jurisdictional clause.

67. The Court has examined this contention, but does not think that the two cases are in any way comparable. When States intend to create a right of action of this kind they adopt a different method. Such a right has, in special circumstances, been conferred on States belonging to a body of compact size such as the Council of the League of Nations, invested with special supervisory functions and even a power of intervention in the matter, as provided by the jurisdictional clause of the minorities treaties—see for instance Article 12 of the minorities treaty with Poland, signed at Versailles on 28 June 1919, which was typical. Even so the right, as exercisable by members of the League Council, in effect as part of the Council's work, with which they would *ex hypothesi* have been fully familiar, was characterized at the time by an eminent Judge and former President of the Permanent Court as being "in every respect very particular in character" and as going "beyond the province of general international law". The intention to confer it must be quite clear; and the Court holds that for the reasons which have already been given, and for others to be considered later, there was never any intention to confer an invigilatory function of this kind on each and every member of the League.

68. It has to be asked why, if anything of the sort was thought necessary in the case of the mandates, it was not done in the same way as under the minorities clauses (which, in general, were drafted contemporaneously by the same authors)—namely by conferring a right of action on members of the League Council as such, seeing that it was the Council which had the supervisory function under the mandates? This would have been the obvious, and indeed the only workable method of procedure. Alternatively, it must be asked why, if it was indeed thought necessary in the case of mandates to invest all the members of the League with this function, for the protection of the mandates, it was apparently considered sufficient in the minorities case to bring in only the members of the League Council?

69. The Court finds itself unable to reconcile the two types of case except upon the assumption, strongly supported by every other factor involved, that, as regards the mandates, the jurisdictional clause was intended to serve a different purpose, namely to give the individual members of the League the means, which might not otherwise be available to them through League channels, of protecting their "special interests" relative to the mandated territories. In the minorities case, the right of action of the members of the Council under the jurisdictional clause

was only intended for the protection of minority populations. No other purpose in conferring a right of action on members of the League Council would have been possible in that case. This was not so in regard to the mandates, the provisions of which afforded another and perfectly natural explanation of the jurisdictional clause and of its purpose; whereas, if a policing function had been intended, it is obviously to the members of the Council that it would have been given, and in the same sort of terms as in the minorities case.

70. In this last connection it is of capital importance that the right as conferred in the minorities case was subjected to certain characterizations which were wholly absent in the case of the jurisdictional clause of the mandates. Any "difference of opinion" was characterized in advance as being justiciable, because it was to be "held to be a dispute of an international character" within the meaning of Article 14 of the Covenant (this was the well-known "deeming" clause), so that no question of any lack of legal right or interest could arise. The decisions of the Court were moreover, to be final and, by means of a reference to Article 13 of the Covenant, were given an effect *erga omnes* as a general judicial settlement binding on all concerned. The jurisdictional clause of the mandates on the other hand, was essentially an ordinary jurisdictional clause, having none of the special characteristics or effects of those of the minorities treaties.

71. That the League Council had functions in respect of mandates, just as it did in respect of minorities, can only serve to underline the fact that in the former case no right of recourse to the Court was conferred on the members of the Council in their capacity as such, although the mandates were drafted in full knowledge of what the minorities treaties contained. The true significance of the minorities case is that it shows that those who framed the mandates were perfectly capable of doing what the Applicants claim was done, when they intended to. The conclusion must be that in the case of the mandates they did not intend to.

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72. Since the course adopted in the minorities case does not constitute any parallel to that of the mandates, the Applicants' contention is seen to depend in the last analysis almost entirely on what has been called the broad and unambiguous language of the jurisdictional clause—or in other words its literal meaning taken in isolation and without reference to any other consideration. The combination of certain phrases in this clause, namely the reference to "any dispute whatever", coupled with the further words "between the Mandatory and another Member of the League of Nations" and the phrase "relating ... to the provisions of the Mandate", is said to permit of a reference to the Court of a dispute about any provision of the Mandate, and thus to imply, reflect or bear witness to the existence of a legal right or interest for every member of the League in the due execution of every such provision. The Court does not however consider

that the word "whatever" in Article 7, paragraph 2, does anything more than lend emphasis to a phrase that would have meant exactly the same without it; or that the phrase "any dispute" (whatever) means anything intrinsically different from "a dispute"; or that the reference to the "provisions" of the Mandate, in the plural, has any different effect from what would have resulted from saying "a provision". Thus reduced to its basic meaning, it can be seen that the clause is not capable of carrying the load the Applicants seek to put upon it, and which would result in giving such clauses an effect that States accepting the Court's jurisdiction by reason of them, could never suppose them to have.

73. In this connection the Court thinks it desirable to draw attention to the fact that a considerable proportion of the acceptances of its compulsory jurisdiction which have been given under paragraph 2 of Article 36 of the Statute of the Court, are couched in language similarly broad and unambiguous and even wider, covering all disputes between the accepting State and any other State (and thus "any dispute whatever")—subject only to the one condition of reciprocity or, in some cases, to certain additional conditions such as that the dispute must have arisen after a specified date. It could never be supposed however that on the basis of this wide language the accepting State, by invoking this clause, was absolved from establishing a legal right or interest in the subject-matter of its claim. Otherwise, the conclusion would have to be that by accepting the compulsory jurisdiction of the Court in the widest terms possible, States could additionally create a legal right or interest for themselves in the subject-matter of any claim they chose to bring, and a corresponding answerability on the part of the other accepting State concerned. The underlying proposition that by conferring competence on the Court, a jurisdictional clause can thereby and of itself confer a substantive right, is one which the Court must decline to entertain.

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74. The Court must now, though only as a digression, glance at another aspect of the matter. The present Judgment is based on the view that the question of what rights, as separate members of the League, the Applicants had in relation to the performance of the Mandate, is a question appertaining to the merits of their claim. It has however been suggested that the question is really one of the admissibility of the claim, and that as such it was disposed of by the Court's 1962 Judgment.

75. In the "dispositif" of the 1962 Judgment, however, the Court, after considering the four preliminary objections advanced—which were objections to the competence of the Court—simply found that it had "jurisdiction to adjudicate upon the merits". It thus appears that the Court in 1962 did not think that any question of the admissibility of

the claim, as distinct from that of its own jurisdiction arose, or that the Respondent had put forward any plea of inadmissibility as such: nor had it,—for in arguing that the dispute was not of the kind contemplated by the jurisdictional clause of the Mandate, the purpose of the Respondent was to show that the case was not covered by that clause, and that it did not in consequence fall within the scope of the competence conferred on the Court by that provision.

76. If therefore any question of admissibility were involved, it would fall to be decided now, as occurred in the merits phase of the *Nottebohm* case (*I.C.J. Reports 1955*, p. 4); and all that the Court need say is that if this were so, it would determine the question in exactly the same way, and for the same reasons, as in the present Judgment. In other words, looking at the matter from the point of view of the capacity of the Applicants to advance their present claim, the Court would hold that they had not got such capacity, and hence that the claim was inadmissible.

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77. Resuming the main thread of its reasoning, the Court will now refer to a supplementary element that furnishes indications in opposition to the interpretation of the jurisdictional clause advanced by the Applicants. This contra-indication is afforded by the genesis of the jurisdictional clause appearing in all the instruments of mandate. The original drafts contained no jurisdictional clause. Such a clause was first introduced in connection with the 'B' mandates by one of the States participating in the drafting, and concurrently with proposals made by that same State for a number of detailed provisions about commercial and other "special interests" rights (including missionary rights) for member States of the League. It was little discussed but, so far as it is possible to judge from what is only a summary record, what discussion there was centred mainly on the commercial aspects of the mandates and the possibility of disputes arising in that regard over the interests of nationals of members of the League. This appears very clearly from the statements summarized on pages 348, 349 and 350 of Part VI A of the *Recueil des Actes* of the Paris Peace Conference, 1919-1920, if these statements are read as a whole. No corresponding clear connection emerges between the clause and possible disputes between mandatories and individual members of the League over the conduct of the mandates as mandates. That such disputes could arise does not seem to have been envisaged. In the same way, the original drafts of the 'C' mandates which, in a different form, contained broadly all that now appears in the first four articles of the Mandate for South West Africa, had no jurisdictional clause and no "missionary clause" either. The one appeared when the other did.

78. The inference to be drawn from this drafting history is confirmed by the very fact that the question of a right of recourse to the Court arose

only at the stage of the drafting of the instruments of mandate, and that as already mentioned, no such right figured among the "securities" for the performance of the sacred trust embodied in the League Covenant.

79. After going through various stages, the jurisdictional clause finally appeared in the same form in all the mandates, except that in the case of the Mandate for Tanganyika (as it then was) a drafting caprice caused the retention of an additional paragraph which did not appear, or had been dropped in all the other cases. Once the principle of a jurisdictional clause had been accepted, the clause was then introduced as a matter of course into all the mandates. This furnishes the answer to the contention that, in the case of the 'C' mandates, it must have been intended to relate to something more than the single "missionary clause" (Article 5 in the Mandate for South West Africa). Also, it must not be forgotten that it was simultaneously with the missionary clause that the jurisdictional clause was introduced; and that at the time much importance was attached to missionary rights. In any event, whatever the purpose of the jurisdictional clause, it was the same for all the mandates, and for the three categories of mandate. It is in the light of the mandates system generally that this purpose must be assessed, —and, so considered, the purpose is clear.

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80. The Court will now consider a final contention which has been advanced in support of the Applicants' claim of right, namely the so-called "necessity" argument.

81. In order to do this, and at the risk of some unavoidable repetition, it is necessary to review a little more closely the functioning of the mandates system. This system, within the larger setting of the League, was an entirely logical one. The various mandatories did not deal with the individual members of the League over the "conduct" provisions of their mandates, but with the appropriate League organs. If any difficulty should arise over the interpretation of any mandate, or the character of the mandatory's obligations, which could not be cleared up by discussion or reference to an *ad hoc* committee of jurists—a frequent practice in the League—the Council could in the last resort request the Permanent Court for an advisory opinion. Such an opinion would not of course be binding on the mandatory—it was not intended that it should be—but it would assist the work of the Council.

82. In the Council, which the mandatory was entitled to attend as a member for the purposes of any mandate entrusted to it, if not otherwise a member—(Article 4, paragraph 5, of the Covenant), the vote of the mandatory, if present at the meeting, was necessary for any actual "decision" of the Council, since unanimity of those attending was the basic voting rule on matters of substance in the main League organs—(Article 5, paragraph 1, of the Covenant). Thus there could never be any formal clash between the mandatory and the Council as such. In practice, the unanimity rule was frequently not insisted upon, or its

impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory "vetoed" what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions.

83. Such were the methods, broadly speaking, adopted in the relations between the various mandatories and the League over the conduct of the mandates, and it can be seen how out of place in the context would have been the existence of substantive rights for individual members of the League in the conduct of the mandates (particularly if backed up by a right of recourse to the Court) exercisable independently of the Council at the will of the member State. On the other hand—and here again the concept was entirely logical—by the combined effect of the "special interests" provisions and the jurisdictional clause—(the latter alone could not have sufficed)—a right of recourse was given to the individual League members in respect of such interests, since the League Council could not be expected to act in defence of a purely national, not "League", interest.

84. Under this system, viewed as a whole, the possibility of any serious complication was remote; nor did any arise. That possibility would have been introduced only if the individual members of the League had been held to have the rights the Applicants now contend for. In actual fact, in the 27 years of the League, all questions were, by one means or another, resolved in the Council; no request was made to the Court for an advisory opinion; so far as is known, no member of the League attempted to settle direct with the mandatory any question that did not affect its own interests as a State or those of its nationals, and no cases were referred to the Permanent Court under the adjudication clause except the various phases of one single case (that of the *Mavrommatis Concessions*) coming under the head of "special interests". These facts may not be conclusive in themselves; but they have a significance which the Court cannot overlook, as suggesting that any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League,—not between the mandatory and individual members of the League.

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85. Such then is the background against which the "necessity" argument has to be viewed. The gist of the argument is that since the Council had no means of imposing its views on the mandatory, and since no advisory opinion it might obtain from the Court would be binding on the latter, the mandate could have been flouted at will. Hence, so the contention goes, it was essential, as an ultimate safeguard or security for the performance of the sacred trust, that each member of the League should be deemed to have a legal right or interest in that matter and, in the last resort, be able to take direct action relative to it.

86. It is evident on the face of it how misconceived such an argument must be in the context of a system which was expressly designed to include all those elements which, according to the "necessity" argument, it was essential to guard or provide securities against. The Court will leave on one side the obvious improbability that had the framers of the mandates system really intended that it should be possible in the last resort to impose a given course or policy on a mandatory, in the performance of the sacred trust, they would have left this to the haphazard and uncertain action of the individual members of the League, when other much more immediate and effective methods were to hand—for instance, by providing that mandatories should not be members of the Council for mandates purposes, though entitled to attend, or should not be entitled to exercise a vote on mandates questions; or again by investing members of the Council itself with a right of action before the Court, as in the minorities case. The plain fact is that, in relation to the "conduct" provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories—the system adopted was one which deliberately rendered this impossible. It was never intended that the views of the Court should be ascertained in a manner binding on mandatories, or that mandatories should be answerable to individual League members as such in respect of the "conduct" provisions of the mandates. It is scarcely likely that a system which, of set purpose, created a position such that, if a mandatory made use of its veto, it would thereby block what would otherwise be a decision of the Council, should simultaneously invest individual members of the League with, in effect, a legal right of complaint if this veto, to which the mandatory was entitled, was made use of. In this situation there was nothing at all unusual. In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception,—and this was even more the case in 1920 than today.

87. As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the mandate itself, the risk of this was evidently taken with open eyes; and that the risk was remote, the event proved. Acceptance of the Applicants' contention on the other hand, would involve acceptance of the proposition that even if the Council of the League should be perfectly satisfied with the way in which a mandatory was carrying out its mandate, any individual

member of the League could independently invoke the jurisdiction of the Court in order to have the same conduct declared illegal, although, as mentioned earlier, no provision for recourse to the Court was included amongst the "securities" provided for by the Covenant itself. Here again the difference is evident between this case and that of the minorities, where it was the members of the Council itself who had that right. The potential existence of such a situation as would have arisen from investing all the members of the League with the right in question is not reconcilable with the processes described above for the supervision of the mandates. According to the methods and procedures of the League as applied to the operation of the mandates system, it was by argument, discussion, negotiation and co-operative effort that matters were to be, and were, carried forward.

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88. For these reasons the Court, bearing in mind that the rights of the Applicants must be determined by reference to the character of the system said to give rise to them, considers that the "necessity" argument falls to the ground for lack of verisimilitude in the context of the economy and philosophy of that system. Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 *(c)*, of its Statute.

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89. The Court feels obliged in conclusion to point out that the whole "necessity" argument appears, in the final analysis, to be based on considerations of an extra-legal character, the product of a process of after-knowledge. Such a theory was never officially advanced during the period of the League, and probably never would have been but for the dissolution of that organization and the fact that it was then considered preferable to rely on the anticipation that mandated territories would be brought within the United Nations trusteeship system. It is these subsequent events alone, not anything inherent in the mandates system as it was originally conceived, and is correctly to be interpreted, that give rise to the alleged "necessity". But that necessity, if it exists, lies in the political field. It does not constitute necessity in the eyes of the law. If the Court, in order to parry the consequences of these events, were now to read into the mandates system, by way of, so to speak, remedial action, an element wholly foreign to its real character and structure as originally contemplated when the system was instituted, it

would be engaging in an *ex post facto* process, exceeding its functions as a court of law. As is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.

90. It is always open to parties to a dispute, if they wish the Court to give a decision on a basis of *ex aequo et bono*, and are so agreed, to invoke the power which, in those circumstances, paragraph 2 of this same Article 38 confers on the Court to give a decision on that basis, notwithstanding the provisions of paragraph 1. Failing that, the duty of the Court is plain.

91. It may be urged that the Court is entitled to engage in a process of "filling in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should. On a previous occasion, which had certain affinities with the present one, the Court declined to find that an intended three-member commission could properly be constituted with two members only, despite the (as the Court had held) illegal refusal of one of the parties to the jurisdictional clause to appoint its arbitrator —and although the whole purpose of the jurisdictional clause was thereby frustrated. In so doing, the Court (*I.C.J. Reports 1950*, p. 229) said that it was its duty "to interpret the Treaties, not to revise them". It continued:

> "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."

In other words, the Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action.

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92. It may also be urged that the Court would be entitled to make good an omission resulting from the failure of those concerned to foresee what might happen, and to have regard to what it may be presumed the framers of the Mandate would have wished, or would even have made express provision for, had they had advance knowledge of what was to occur. The Court cannot however presume what the wishes and intentions of those concerned would have been in anticipation of events

that were neither foreseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumptions in effect contended for by the Applicants as to what those intentions were.

93. In this last connection, it so happens that there is in fact one test that can be applied, namely by enquiring what the States who were members of the League when the mandates system was instituted did when, as Members of the United Nations, they joined in setting up the trusteeship system that was to replace the mandates system. In effect, as regards structure, they did exactly the same as had been done before, with only one though significant difference. There were of course marked divergences, as regards for instance composition, powers, and voting rules, between the organs of the United Nations and those of the League. Subject to that however, the Trusteeship Council was to play the same sort of role as the Permanent Mandates Commission had done, and the General Assembly (or Security Council in the case of strategic trusteeships) was to play the role of the League Council; and it was to these bodies that the various administering authorities became answerable. No right of supervision or of calling the administering authority to account was given to individual Members of the United Nations, whose sphere of action, as in the case of the League members, is to be found in their participation in the work of the competent organs.

94. The significant difference referred to lies in the distribution of the jurisdictional clause amongst the various trusteeship agreements. The clause itself is almost identical in its terms with that which figured in the mandates, and was clearly taken straight from these ("any dispute whatever", "between the Administering Authority and another Member of the United Nations", "relating to . . . the provisions of this Agreement"). But whereas the jurisdictional clause appeared in all the mandates, each of which contained "special interests" provisions, it figures only in those trusteeship agreements which contain provisions of this type, and not in agreements whose provisions are confined entirely to the performance of the trust in accordance with the basic objectives of the system as set out in Article 76 of the Charter.

95. If therefore, the contention put forward by the Applicants in the present case were correct in principle (and this contention is in a major degree founded on the existence and wording of the jurisdictional clause, and also involves the erroneous assumption that it can *per se* confer substantive rights), it would follow that, in the case of some of the trusteeships, individual members of the United Nations would be held to have a legal right or interest in the conduct and administration of the trust, but in relation to others they would not, although these were no less trusteeships,—no less an expression of the "sacred trust of civilization". The implications become even more striking when it is realized that the trusteeships to which no jurisdictional clause attaches are three previous Pacific 'C' mandates—that is to say the class of

territory inhabited by precisely the most undeveloped categories of peoples, the least "able to stand by themselves".

96. It has been sought to explain this apparent anomaly by reference to the strong negotiating position in which the various mandatories found themselves, inasmuch as they were not legally obliged to place their mandated territories under trusteeship at all, and could therefore, within limits, make their own terms. But this would in no way explain why they seem to have been willing to accept a jurisdictional clause in the case of trusteeships that contained "special interests" provisions, including one Pacific 'C' mandate of this kind, but were not willing to do so in the case of trusteeships whose terms provided only for the performance of the trust in accordance with the basic objectives of the system.

97. No doubt, as has been pointed out, even where no jurisdictional clause figures in a trusteeship agreement, it would be possible, in those cases where the administering authority had made an appropriately worded declaration in acceptance of the Court's compulsory jurisdiction under the optional clause provision of Article 36 of the Court's Statute, for another member of the United Nations having made a similar and interlocking declaration, to seise the Court of a dispute regarding the performance of the trust. The number of cases in which this could occur has, however, always been very limited, and the process is rendered precarious and uncertain, not only by the conditions contained in, and the nature of the disputes covered by certain of these declarations, but also by their liability to amendment, withdrawal, or non-renewal. The optional clause system could therefore in no way have afforded a substitute for a general obligation to adjudicate, if such an obligation had really been regarded as essential;—moreover, even in those cases where an optional clause declaration could be invoked, it would still be necessary for the invoking State—as here—to establish the existence of a legal right or interest in the subject-matter of its claim.

98. It has also been sought to explain why certain trusteeship agreements do not contain the jurisdictional clause by a further appeal to the "necessity" argument. This clause was no longer necessary, so it was contended, because the United Nations voting rule was different. In the League Council, decisions could not be arrived at without the concurrence of the mandatory, whereas in the United Nations the majority voting rule ensured that a resolution could not be blocked by any single vote. This contention would not in any event explain why the clause was accepted for some trusteeships and not for others. But the whole argument is misconceived. If decisions of the League Council could not be arrived at without the concurrence, express or tacit, of the mandatory, they were, when arrived at, binding: and if resolutions of the United Nations General Assembly (which on this hypothesis would be the relevant organ) can be arrived at without the concurrence of the administering authority, yet when so arrived at—and subject to certain exceptions not here material—they are not binding, but only recommendatory in character. The persuasive force of Assembly resolutions

can indeed be very considerable,—but this is a different thing. It operates on the political not the legal level: it does not make these resolutions binding in law. If the "necessity" argument were valid therefore, it would be applicable as much to trusteeships as it is said to be to mandates, because in neither case could the administering authority be coerced by means of the ordinary procedures of the organization. The conclusion to be drawn is obvious.

* * *

99. In the light of these various considerations, the Court finds that the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them.

100. For these reasons,

THE COURT,

by the President's casting vote—the votes being equally divided,

decides to reject the claims of the Empire of Ethiopia and the Republic of Liberia.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of July, one thousand nine hundred and sixty-six, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Empire of Ethiopia, the Government of the Republic of Liberia and the Government of the Republic of South Africa, respectively.

(Signed) Percy C. SPENDER,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Percy SPENDER makes the following declaration:

1. The judgment of the Court, which consists of its decision and the reasons upon which it is based (Article 56 (1) of the Statute), is that the Applicants cannot be considered to have established that they have any legal right or interest in the subject-matter of the present claims, and that accordingly their claims are rejected.

2. Having so decided, the Court's task was completed. It was not necessary for it to determine whether the Applicants' claims should or could be rejected on any other grounds. Specifically it was not called upon to consider or pronounce upon the complex of issues and questions involved in Article 2 of the mandate instrument ("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"); or Article 6 thereof ("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"); or to enter into a legal enquiry as to what it would or might have decided in respect to these and related matters had it not reached the decision it did. To have done so would, in my view, have been an excess of the judicial function.

3. The Judgment of the Court does not represent the unanimous opinion of the judges and, in consequence, Article 57 of the Statute of the Court, which provides that in that case "any judge shall be entitled to deliver a separate opinion", comes into operation.

4. It follows that any judge, whether he concurs in or dissents from the Court's judgment, is entitled, if he wishes, to deliver a separate opinion.

5. Since in my view there are grounds other than as stated in the Judgment upon which the Applicants' claims or certain of them could have been rejected, and since I agree with the Court's Judgment, there arises for me the question whether, and if so to what extent, it is permissible or appropriate to express by way of separate opinion my views on these additional grounds for rejecting the Applicants' claims or certain of them.

6. In order to answer this question, it is necessary to consider not merely the text of Article 57 but the general purpose it was intended to serve, and its intended application.

7. I would not wish to say anything which would unreasonably restrict the right accorded to a judge by Article 57. It is an important right which must be safeguarded. Can it be, however, that there are no limits to the scope and extent of the exercise of this right by any individual judge? I cannot think so. There must, it seems to me, be some limits, to proceed beyond which could not be claimed to be a proper exercise of the right the Statute confers.

8. The right of a judge to express a dissenting opinion in whole or in part was not easily won.

9. In the Hague Convention of 1899 a right of dissent from arbitral decisions was recognized; it was adopted without discussion. At the Hague Conference of 1907 the question of dissent or no dissent was discussed at considerable length. In the result the right of dissent was suppressed.

10. The Committee of Jurists, in drafting the Statute of the Permanent Court in 1920, after discussion, reached the conclusion that a judge should be allowed to publish his dissent, but not his reasons. This however failed to receive the approval of the Council of the League at its tenth meeting in Brussels in October of that year. There was then introduced into the text the right of a judge who did not concur in all or part of the judgment to deliver a separate opinion.

11. The record reveals clearly that this recognition of the right of a judge not only to publish his dissent but, as well, to express the reasons for the same, was the result of compromise (*League of Nations Documents on Article 14 of the Covenant*, pp. 138 *et seq.*). It was stated by Sir Cecil Hurst, who was at Brussels, and who defended, before the Sub-Committee of the Assembly, the view arrived at at the Brussels meeting of the Council, that the reason for disagreeing with the Committee of Jurists was because it was feared in England that the decisions of the Court might establish rules of law which would be incompatible with the Anglo-Saxon legal system. The agreement reached in the Council of the League in Brussels, it seems clear, aimed at avoiding this apprehended danger by the publication of dissenting opinions.

12. This would strongly suggest that the contemplated purpose of the publication of the dissent, certainly its main purpose, was to enable the view of the dissenting judge or judges on particular questions of law dealt with in the Court's judgment to be seen side by side with the views of the Court on these questions.

13. In the result there was, without dissent, written into the Statute of the Permanent Court Article 57 thereof, which read:

> "If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion."

14. There is the considerable authority of President of the Permanent Court Max Huber for the view that the contemplated purpose of the right to publish reasons for a dissent was as stated in paragraph 12 above. In the course of a long discussion in that Court in July of 1926 on the general principle of dissenting opinions (*Series D, Addendum No. 2*, p. 215) he is recorded as having observed (my italics):

> "Personally the President had always construed the right conferred on judges by Article 57 as *a right to state their reasons* and not simply to express their dissent, the *object* being to enable judges to explain their understanding of international law in order to prevent the creation of a false impression that a *particular judgment* or *opinion* expressed the unanimous opinion of the Court, in regard to the interpretation of *international law on a particular point*."

15. Further support for Max Huber's view is, I think, to be found in a resolution of the Permanent Court of 17 February 1928 which, in part, read as follows (my italics): "Dissenting opinions are designed *solely* to set forth *the reasons for which judges do not feel able to accept the opinion of the Court . . .*"

16. It would appear evident from the record that it would have been quite foreign to the understanding of those who drafted the provision according the right of a judge to publish the reasons for his dissent, that this right could be one which permitted a judge to express his opinion at large, on matters not directly connected with the nature and subject-matter of the Court's decision.

17. This then was the origin of Article 57 of this Court's Statute, which was evidently based by its framers not only on the text of the corresponding article in the Statute of the Permanent Court, but, as well, upon the commonly understood purpose a dissenting opinion was designed to serve.

18. Article 57 of this Court's Statute extends the right to deliver a separate opinion to *any* judge, where the judgment does not represent in whole or in part the unanimous opinion of the judges.

19. If a dissenting judge is free to state his opinion on matters which are not directly connected with the Court's judgment, so it would appear is a concurring judge who, for any reason which recommends itself to him, desires to deliver a separate opinion.

20. In other words, if any judge is entitled to give a separate opinion quite outside the range of the Court's decision and on issues upon which the Court has made no findings of any kind, every other judge is so entitled. The inevitable confusion which this could lead to cannot, in my view, be supported by any rational interpretation and application of Article 57. It would, or could, in practice be destructive of the authority of the Court.

21. President Basdevant, a former distinguished President of this Court, in his *Dictionary of the Terminology of International Law* (p. 428) defines an individual concurring opinion as not a mere statement of disagreement as to the reasons given for a decision, the *dispositif* of which the judge accepts, but the formal explanation he gives of the grounds on which he personally does so; whilst a dissenting opinion denotes not a mere statement of dissent relative to a decision but the formal explanation given of the grounds on which the judge bases his dissent.

22. In the light of all these considerations the following conclusions appear justified:

(a) individual opinions, whether dissenting or merely separate, were, when the Court's Statute was drafted, regarded as such as were directly connected with and dependent upon the judgment of the

Court itself (or in the case of advisory opinions (Statute, Article 68, Rules, Article 84 (2)), its opinion), in the sense of either agreeing or disagreeing with it, or its motivation, or as to the sufficiency of the latter;

(b) the judgment (or opinion) of the Court must be the focal point of the different judicial views expressed on any occasion, since it is the existence and nature of the judgment (or opinion) and their relationship to it that gives individual opinions their judicial character;

(c) in principle such opinions should not purport to deal with matters that fall entirely outside the range of the Court's decision, or of the decision's motivation;

(d) there must exist a close direct link between individual opinions and the judgment of the Court.

23. If these conclusions are, as I think them to be, sound, there still remain wide limits within which an individual judge may quite properly go into questions that the Court has not dealt with, provided he keeps within the ambit of the order of question decided by the Court, and in particular observes the distinction between questions of a preliminary or antecedent character and questions not having that character. I cannot however agree that a separate or dissenting opinion may properly include all that a judge thinks the judgment of the Court should have included.

24. The mere fact that a judgment (or opinion) of the Court has been given does not afford justification for an expression of views at large on matters which entirely exceed the limits and intended scope of the judgment (or opinion). Without the judgment (or opinion) there would, of course, be no relationship and nothing of a judicial character that could be said by any judge. There is equally no relationship imparting judicial character to utterances about questions which the Court has not treated of at all.

25. Suppose that the Court, on a request to give an advisory opinion, refuses to do so, as for example it did in the case of *Eastern Carelia, 1923, Series B, No. 5*, on a specific ground stated; could a judge of the Court, by way of a separate individual or dissenting opinion, proceed to give his views as to what the opinion of the Court should have been if it had decided to express it? I should have thought not.

26. Is there in principle any real distinction between this supposed case and the present cases? I think not. The Court has decided, on what is a preliminary question of the merits, that the Applicants' claims must be rejected: thus further examination of the merits becomes supererogatory. Is any judge in a separate opinion, in disregard of the particular issue or question decided by the Court and the reasoning in support of the decision, entitled to go beyond giving his reasons for disagreeing with that decision, and passing entirely outside it to express his views on what the Court should have decided in relation to other matters of the merits, on which no decision has been arrived at and no

expression of opinion has been given by the Court? To do so, in my view, would be to go outside the proper limits of an individual or separate opinion.

27. It cannot be that the mere *dispositif* itself can enlarge the proper scope of a separate opinion. The *dispositif* cannot be disembowelled from the Court's opinion as expressed in its motivations. It surely cannot be that just because the *dispositif* rejects the claims, it is permissible for a dissenting judge to give his reasons why the claims should be upheld in whole or part. The content of the judgment must be obtained from reading together the decision and the reasons upon which it is based. The claims are dismissed for particular assigned reasons and on a specific ground. It is to these reasons and this ground, it seems to me, that in principle all separate opinions must be directed, not to wholly unconnected issues or matters.

28. It would seem inconceivable that a judge who concurs in the *dispositif* should in a separate opinion be free to go beyond considerations germane to the actual decision made by the Court and its motivations. In the present cases he would, of course, be free to advance another ground of the same order as that on which the Court's decision rests which would separately justify it, or other related reasons which might go to support it. But it would hardly be justifiable for such a judge to proceed further into the merits, expressing his views on how he thinks the Court should or would have pronounced upon the whole complex of questions centering around different provisions of the Mandate, for example Articles 2 and 6 thereof, had the Court not reached the decision it actually did.

29. There is however no warrant to be found in Article 57 of the Court's Statute which would leave it free for a dissenting judge to do this but not a concurring judge. They both stand upon an equal footing. The *dispositif* and a judge's vote thereon, for or against, could not, in itself, affect the proper limits within which any separate opinion under Article 57 may be delivered.

30. In the present cases the questions of merits that arise can themselves be divided into two categories, namely questions of what might be called the ultimate merits and certain other questions which, though appertaining to the merits, have an antecedent or more fundamental character, in the sense that if decided in a certain way they render a decision on the ultimate merits unnecessary and indeed unwarranted. As the Judgment states, there are two questions having that character—that of the Applicants' legal right and interest (which is the basis of the Court's decision) and that of the continued subsistence of the Mandate for South West Africa.

31. It would be entirely proper for a judge who votes in favour of the *dispositif* to base a separate opinion wholly or in part upon the second of those two questions. He would not be going outside the

order of question considered by the Court, namely that of antecedent issues on merits operating as a bar to all the Applicants' claims, he would not have attempted to pronounce on the question of ultimate merits, necessarily excluded and rendered irrelevant by the Court's Judgment.

32. To the extent that any separate opinion, whether concurring or dissenting, goes outside the order of the question considered by the Court, it is my view that the opinion ceases to have any relationship with the judgment of the Court, whatever the means may be by which such a relationship or link is sought to be established—it ceases therefore to be an expression properly in the nature of a judicial expression of opinion, for, as has been already indicated, it is only through their relationship to the judgment that a judicial character is imparted to individual opinions.

33. In my view, such an opinion, to the extent it exceeds these limits, ceases to be a separate opinion as contemplated by the Court's Statute and Rules since it expresses views about matters for which the judgment of the Court does not provide the basis necessary for the process of agreement or disagreement which is the sole legitimate *raison d'être* of a separate opinion.

34. I am not persuaded that the views I have expressed are in any sense invalidated if it be that on one or two occasions this or that judge has, in some manner, not acted in conformity therewith. Action which is impermissible does not become permissible because it may have been overlooked at the time or no objection taken. The correct path to follow remains the correct path even though there may have been occasional straying from it.

35. These views must dictate my own action. However I might agree or disagree with the views expressed by any individual judge in a separate opinion in relation to the complex of questions both of law and fact centering around Articles 2 and 6 of the Mandate and certain other articles thereof, I would not, in my considered view, be entitled to express any opinion thereon. Were I to do so I would be expressing purely personal and extra-judicial views contrary to what I think is the object and purpose of Article 57 of the Statute, and contrary, in my view, to the best interests of the Court.

36. And what it is not permissible or proper to do in a separate opinion, it is certain would be impermissible and improper to do in a declaration.

37. I associate myself unreservedly with the Court's Judgment, and, having regard to the views herein expressed, have nothing to add thereto.

Judge MORELLI and Judge *ad hoc* VAN WYK append Separate Opinions to the Judgment of the Court.

Vice-President WELLINGTON KOO, Judges KORETSKY, TANAKA, JESSUP, PADILLA NERVO, FORSTER and Judge *ad hoc* Sir Louis MBANEFO append Dissenting Opinions to the Judgment of the Court.

(Initialled) P. C. S.

(Initialled) S. A.