The above case of R v. Crewe, Ex parte Sekgome establishes two main principles: (1) That the Protecting State has authority or jurisdiction within the protected territory but has no "territorial dominion" over it; (2) that the inhabitants of the protected territory are not subjects of the Protecting State.

In the Stevenson Case these principles were held to be applicable to the Mandated territory of New Guinea.[05] Evatt, J. in holding that the principles in the Sekgome case applied to a mandated territory (such as New Guinea), said: "It is quite fallacious to infer from the fact that in pursuance of its international duties under the mandate, the Commonwealth of Australia (the Mandatory) exercises full and complete jurisdiction over the territory as though it possessed unlimited sovereignty therein...."[06]

On the question of the status of the inhabitants of the mandated territories, the Permanent Mandates Commission lay down certain principles as soon as it had begun to function. These principles were adopted by the Council of the League of Nations in April 1923 with minor modifications. The principles were that:

"(1) The status of the native inhabitants of a mandated

territory is distinct from that of the nationals of the mandatory power and cannot be identified therewith by any process having general application.

(2) The native inhabitants of a mandated territory are not invested with nationality of the mandatory power by reason of the protection extended to them.

(3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the Mandatory Power in accordance with arrangements which it is open to such Mandatory Power to make, with this object under its own law.

(4) It is desirable that native inhabitants who receive the protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate."[07]

The principle regarding the status of the people of a Protected Territory as established in the Sekgome case above is similar to the first, second, and third principles adopted by the Council of the League of Nations on the status of the inhabitants of mandated territories.

Corbett is of the view that the mandated territory is "never

to be incorporated" within the territory of the mandatory power.[08] If so the phrase in Article 22 of the Covenant "as integral portions of its territory" suggests that "as" is an equivalent of "as it were". The accepted conclusion as to the status of inhabitants of mandated territories shows clearly that the mandated territory is not part of the territory of the mandatory power.[09]

This question raises the broader question of the location of sovereignty over the mandated areas. The answer to this question would further shed light on the juridical status of a mandated territory. A corollary to this question is to what extent could the mandatory exercise its jurisdiction inside a mandated territory and what was the nature of the limits (if any) to such jurisdiction. There has been a great diversity of opinion on these questions among jurists as well as among judicial tribunals. It is proposed now to discuss the above two inter-related questions in the light of opinions and theories put forward so far.

In Frost v. Stevenson[10] the High Court of Australia held that the Treaty of Peace, read as a whole, avoids cession of territory to the mandatory and that "in the absence of definite evidence to the contrary, it must...be taken that New Guinea (one of the mandated territories) ha(d) not become part of the

dominions of the Crown."[11]

The above case was an appeal from the Supreme Court of New South-Wales. The High Court of Australia had to decide whether or not one Frost could be extradited to the mandated territory of New Guinea by an order of a magistrate of the State of New South Wales in order to stand trial in that territory.[12] The order was made under the Fugitive Offenders Act 1881,[13] and it was contended on behalf of Frost that the Act was not applicable to the mandated territory so that no order could be made under the Act in respect of the territory.

By section 12, the Act could be extended for application to such British possessions as considered appropriate by means of an Order in Council. Section 36 provided that His Majesty may direct that "the Act shall apply as if, subject to the conditions, exceptions and qualifications (if any) contained in the Order, any place out of His Majesty's dominions in which His Majesty has jurisdiction, and which is named in the Order, were a British possession...." Two Orders in Council were made in 1925 whereby the Act of 1881 was extended for application to New Guinea. The first order recited the provisions of Article 36 of the Act, that New Guinea was a place out of His Majesty's jurisdiction and that the Act should apply to the territory as if it were a British possession.

Thus the question arose as to whether the Mandated territory of New Guinea was "a part of His Majesty's dominions in which His Majesty ha(d) jurisdiction". If the territory was a place "out of His Majesty's dominions" the Act would be applicable to it by virtue of Article 36.

Section 39 of the Act provided that the term "British possession" included "...all territories and places within His Majesty's domains which are under one legislature...." The appellant contended that inasmuch as Article 39 defined the phrase "British possession" to include territories within the King's dominions "which are under one legislature" and as the Parliament of the Commonwealth of Australia exercised a legislative jurisdiction over the Mandated territory of New Guinea as well as over the Commonwealth, the Commonwealth and the Mandated territory were to be regarded for all purposes of the Act, as one British possession and one part of the King's dominions. This argument was rejected by the Court which held that the Mandated territory of New Guinea was a "place out of His Majesty's dominions" in which he had jurisdiction - notwithstanding the fact that it was under the same legislature as the Commonwealth. One judge was of the opinion that the status of the mandated territory was of a special character, partaking of the nature of a trust.[14] The relevant Orders in Council under the Fugitive Offenders Act 1881 were therefore effectual

to apply the relevant part of that Act for the purpose of the mutual surrender of fugitives between the Mandated territory and the Commonwealth.

Latham, C.J. had this to say: "Consideration of the provisions of the Treaty of Peace with Germany shows, I think, that mandated territories did not become possessions, in the ordinary sense, of the mandatory powers."[15] In his opinion there was considerable doubt as to whether the concept of sovereignty had any application and as to where sovereignty resided in relation to mandated territories.

This contrasts with the position taken by Judge McNair in 1950 as Judge of the International Court of Justice. Judge McNair held that as the Mandates System created "a new species of international government" sovereignty over a mandated territory was "in abeyance" and would revive when the territory became a new independent state. "Thus" observes Judge McNair, apparently in agreement with Latham, C.J., "the doctrine of sovereignty has no application to this new system."[16]

Article 22 of the Covenant refers to former German colonies as having "ceased to be under the sovereignty of Germany." By Article 119 of the Treaty of Versailles Germany renounced in favour of the five Principal Allied and Associated Powers "all rights and titles over her overseas possessions." These

powers then granted mandates to certain powers in respect of the former German possessions. In the case of "C" Mandates such as those over South-West Africa and New Guinea, the mandatory power in each case had "full powers of administration and legislation over the territory subject to the (present) mandate as an integral portion of..." its territory.[17] Article 22 paragraph 6 of the Covenant also provided that such territories could be "administered under the laws of the Mandatory as integral portions of its territory."

It is clear therefore that what was intended in the case of "C" Mandates, was that the fullest powers of government were to be conferred on the Mandatory.[18]

In contrast, in the case of "A" Mandates[19], Article 22 paragraph 4 of the Covenant provided that the existence of the communities in question "as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone." The distinction between this provision (Article 22 paragraph 4) and that applying to "C" Mandates (Article 22 paragraph 6) to the effect that the territory is to be administered as an "integral portion" of the Mandatory's own territory, is very marked, and for this reason it has been argued that sovereignty resides in the mandatory under a "C"

Mandate.[20]

Bentwich has described one school of writers who hold that because of the nature of the powers of the mandatories in the B and C Mandates, the Mandate System in so far as it relates to the B and C Mandates is "only a veiled form of annexation."[21]

Alternatively, as a result of the surrender by Germany and the consequential renunciation of its possessions in favour of the principal Allied and Associated Powers and the creation of the Mandate System by the League of Nations, it has been argued that sovereignty over a mandated territory vested either in the Powers[22] or in the League of Nations.[23]

Lastly it has been argued that sovereignty resides "in the communities which inhabit the mandated territories."[24] This can be said to be particularly true of "A" mandates which, under Article 22 of the Covenant, were regarded as having reached a certain stage of development at which their independence could be provisionally recognised.

The last-mentioned alternative resembles the concept of "dormant sovereignty" put forward by Algeria in 1962 - in a different context - when the General Assembly of the United Nations adopted the Declaration on Permanent Sovereignty over Natural Resources.[25] This argument is also not unlike that advocated by Judge McNair in

1950 when he stated that sovereignty which, over a mandated territory, is "in abeyance" would "revive" and vest in a new state when the territory became independent.[26]

Commenting on Article 257 of the Treaty of 1919 (whereby all property and possessions belonging to Germany were to be transferred to mandatory powers without any payment or credit to the mandatory governments in consideration of this transfer)

Latham, C.J. in the Stevenson Case said:

"This article therefore contemplates the transfer of territory to the mandatory in its capacity as a mandatory power. The intention of this provision must be taken to have been to provide for the transfer of the territory to the mandatory, but only in its capacity as a mandatory. The mandatory, as a kind of international trustee, receives the territory subject to the provisions of the mandate which limit the exercise of the governmental powers of the mandatory. Thus the article... while recognising that the territory is actually to be transferred to the mandatory, emphasises the conditions and limitations upon governmental power which constitute the essence of the mandatory system... The article shows that the intention was to achieve a transfer of a territory without making that territory in the ordinary sense a possession of the mandatory.

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"A territory which is a 'possession' can be ceded by a power to

another power so that the latter power will have complete authority in relation to that territory. Such a cession by a mandatory power would be quite inconsistent with the whole conception of a mandate. A mandated territory is not a possession of a power in the ordinary sense."[27]

This approach is clearly inconsistent with the argument that sovereignty over a mandated territory resides in the Mandatory. Not only is there considerable authority in support of this approach but it is submitted that it has much merit because it is, in principle, in accordance with the aims and aspirations of the Mandate System. The claim that the Mandatory has sovereignty is largely attributed to the wide nature of the discretionary powers of the mandatory particularly in the "B" and "C" mandates. But as Judge Forster of the International Court of Justice has observed the "...discretionary power (of the Mandatory) is by no means synonymous with arbitrary power. It may be lawfully used only for the achievement of the purposes laid down in the Mandate, namely the promotion of 'the material and moral well-being and the social progress of the inhabitants of the territory', and must only be so used. For in the last resort, however complete the powers conferred on the mandatory, they stop short of sovereignty.... Therefore the discretionary power cannot cover acts performed for a purpose different from that stipulated in the Mandate. Such acts would be an abuse of power

(détournement de pouvoir)."[28]

The League itself regarded the mandates as not vesting sovereignty in the mandatories. Bentwich writing on the Permanent Mandates Commission says that it acted upon "the governing principle that sovereignty has not been acquired (by the Mandatory) and has seen to it that the principle is honoured."[29] He also says that the Commission "has been constantly at pains to maintain the character of a trust on behalf of the League of Nations which characterises the "B" and "C" Mandates, and to call into question any assertion of sovereignty over the mandated territory which may slip into any document or instrument issued by the Mandatory."[30]

Thus when a treaty made in 1926 between South Africa and Portugal stated that South Africa "subject to the terms of the mandate, possesses sovereignty over the territory of South-West Africa" the Commission raised objections to it and emphasised the distinction between territories under sovereignty and territories subject to a mandate. South Africa eventually gave in and the matter was satisfactorily resolved so that "the Commission... gained its point which, though it may appear formal involves a principle of great significance."[31]

On a prior occasion in 1922 when an uprising occured within the territory of South-West Africa against the system of forced

labour practised by the Mandatory therein, the Mandates Commission made a searching inquiry into the nature of the administration in the territory and criticised the legislation dealing with forced labour which had provoked the trouble. It also criticised the unnecessary force with which the insurrection had been suppressed.[32]

Again on the same question of sovereignty, Chief Justice Corrie of the Supreme Court of Palestine observed: "to hold that the petitioners are British subjects, would involve that the Crown as mandatory has acquired sovereignty, a view for which no authority has been cited."[33]

Finally, it may be noted that Latham, C.J.'s view that there could not have been any cession by Germany in favour of the mandatories so as to vest sovereignty in them finds support in the above-mentioned South African case of Rex v. Christian: "The animus essential to a legal cession was not present on either side.... The intention of the signatories (of the Treaty of Versailles) seems to have been to place certain overseas possessions relinquished by Germany upon a basis new to international law and regulated primarily by Article 22 (of the Covenant)."[34]

Corbett, on the other hand, argues that as a result of the surrender by Germany of her possessions in favour of the Allied and Associated Powers sovereignty over these possessions passed to the

Powers. He however adds that this joint-sovereignty of the Powers was short lived and was extinguished in respect of each territory[35]. Yet the appointment of a mandatory and the termination of the Powers' joint-sovereignty did not result in sovereignty vesting exclusively in the mandatory - rather, in Corbett's opinion, there was created a form of sovereignty "divided between the mandatory and the League".[36]

With regard to Syria and Mesopotamia, Turkey was made to surrender these to the Powers under Article 94 of the Treaty of Sévres signed on August 10, 1920. Turkey agreed "that Syria, and Mesopotamia, shall in accordance with the fourth paragraph of Article 22, Part I (Covenant of the League of Nations) be provisionally recognised as independent States subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone."[37] By Article 132 of the same Treaty, Turkey renounced in favour of the Principal Allied and Associated Powers all rights and titles to Syria and Mesopotamia.[38] Corbett makes the following comment: "....(T)he sovereignty of Syria and Mesopotamia, taken over by the Allied Powers, has been vested by these Powers in Syria and Mesopotamia themselves. In the recognition, provisional because its continuance will depend on the development of these countries as political units, certain powers usually coupled with independence and sovereignty were reserved for exercise, under the supervision of the

League of Nations, by a Mandatory to be chosen by the Allied and Associated Powers. That choice was the last act of sovereignty on the part of the Allied Powers as such over the territories in question. Henceforth such powers as have not been transferred to the inhabitants of the territories themselves are divided between the Mandatory and the League."[39] Later Corbett makes the same point, namely, that sovereignty over mandated territories in general was divided between two Powers, the Mandatory and the League.[40] It will however be seen that with regard to territories under the category specified by Article 22 paragraph 4 of the Covenant, i.e. "A" category, under which Syria and Mesopotamia were included, Corbett is in effect saying that sovereignty is actually divided into <u>three</u> segments of authority - the territories themselves, the Mandatory and the League. If sovereignty is to have so many sub-divisions the concept ceases to have any meaning. However Corbett's notion of a three-tier sovereignty may have been intended by him to be applicable only to the "A" mandates, so that because of the wording of Article 22 paragraph 4 which specifically mentions that territories under this category may be provisionally recognised as "independent nations" sovereignty over them vests in the mandatory and the League <u>as well as</u> the inhabitants of these territories.

Thus when Corbett discusses the general system of tutelage instituted by Article 22, he emphasises once more that sovereignty

over a mandated territory is divided between the mandatory and the League, but he significantly refrains from arguing here that there is any form of concurrent sovereignty vesting in the inhabitants of the territory. The two-tier division of sovereignty described by Corbett may be explained as follows: The appointment by the Allied Powers of one of their number as Mandatory means that the mandated territory and its people are "being handed over for administration in accordance with the principles laid down in Article 22 of the Covenant...."[41] The power given to the Mandatory to govern, albeit within the limits of Article 22, is, in Corbett's opinion, "a power of the nature of those exercised by persons or groups invested with sovereignty."[42] To the extent that the Mandatory's power is restricted by Article 22, to that extent, and only to that extent, could the League be said to possess sovereignty over mandated territories. Thus the conclusion may be drawn that "in general they (i.e. powers of sovereignty) rest with the mandatory, but some of them are reserved to the League of Nations."[43] But even this comparatively insignificant residual sovereignty of the League is sufficient to rule out annexation by the administering state.[44] "For convenience the mandated territory is in some cases to be <u>administered</u> as an integral portion of that of the mandatory. It is never to be incorporated in the territory of the mandatory... The distinction is analogous to that exis-

ting in English law between a man's own property and that of which he is legal owner as trustee...."[45]

Corbett's idea of a joint sovereignty between the mandatory and the League may be contrasted with that of Lauterpacht's on the same question. The latter is of the view that because of the "cumulative restrictions" on the mandatory's powers the theory that sovereignty rests in the mandatory is negated. Lauterpacht instead goes to the other extreme of suggesting that sovereignty vests solely in the League.[46]

In assessing the merits of all the foregoing arguments it would be wise to take counsel from one authority who cautions against making generalisations as to sovereignty over mandated territories. In his opinion it is far preferable, to consider each question of power and jurisdiction as a particular question.[47]

Abstract generalisations will, it is submitted, be misleading. Each question of power must be considered on its own in the context of the international Mandate System. One power may be said to be within the "sovereignty" of the Mandatory while another may not be. Further, the fact that the Mandatory has the sovereignty to do one act does not mean that it has general sovereignty for all acts. A case which illustrates the above point is Rex v Christian.[48] The question in issue in this case was whether a charge of treason could be made against an inhabitant of the

Mandated territory of South-West Africa charged with taking part in a rebellion against the government of the Mandatory (South Africa). It was argued that, as sovereignty over the mandated territory did not lie either in the local administration or in the Government of South Africa, the elements of the offence of treason were not constituted. The South African Supreme Court rejected this argument and held that the Mandatory Government possessed sufficient elements of both internal and external sovereignty to justify the obligation of allegiance by the inhabitants of the territory.[49] Of course this could mean only that South Africa had enough authority over the territory of South-West Africa for purposes of charging an inhabitant of the territory of treason, and that this did not mean that the Mandatory had powers of sovereignty in every respect over the territory. Any argument to the contrary would lead "to the paradoxical consequence that a power, being sovereign in a certain territory, nevertheless exercises his sovereignty by delegation and in the name of a third party."[50]

It can however certainly be argued that under normal circumstances the day to day administrative chores in a mandated territory, particularly those in a "C" Mandate territory, fall within the exclusive jurisdiction of the Mandatory, so that within the territory it is legally omnipotent. This is a fortiori so since the partnership of the five Principal Allied and Associated

Powers (in whom sovereignty might at one time have vested) has long been dissolved so that none of these powers can today, either as that group of Powers or jointly with the League, claim any kind of executive or judicial function in the territories in question. Further, with the dissolution of the League neither sovereignty nor any form of administrative, judicial or executive powers can vest in that organisation. By the same token, neither can any form of joint-sovereignty between the League and the Powers now exist as the partnership between the Powers and the League has also been long dissolved.[51]

Having assigned the Mandates the Powers became functi officio.[52] The idea of sovereignty being transferred from Germany to the Allied Powers is contrary to the dominant thesis laid down at the Peace Conference that there should be no annexation by either Power. Even the Permanent Mandates Commission[53] has based its work on the principle that sovereignty was not acquired either by the Powers or their appointed Mandatories.[54]

Innes, C.J. in Rex v. Christian agreed in principle with this argument. Commenting on Article 119 of the Treaty of Versailles he said, "the expression 'renounce in favour of' is sometimes used in the Treaty as equivalent to 'cede to' .... Not so with the overseas possessions; or at any rate with such of them as fell within the operation of Article 22 (of the Covenant)."[55]

If, on the other hand, Lauterpacht's theory that sovereignty over mandated territories is vested in the League is adopted then it is arguable that it now rests in the United Nations as its successor - particularly in the light of the Advisory Opinion of the International Court of Justice on the International Status of South-West Africa.[56] Wright, after giving a very penetrating analysis of the various theories of sovereignty concludes that more jurists supported the theory that sovereignty vested in the League than any other theory.[57]

It is submitted however that, in relation to mandated territories, whether sovereignty resides in the United Nations, or in the inhabitants of the territories is of little, if any, practical consequence. What is of importance is the nature and extent of jurisdiction of the mandatory and the limits thereto.

Therefore, as submitted above, instead of making abstract generalisations regarding the location of sovereignty, it is preferable to view the jurisdiction of the Mandatory as the totality of <u>individual</u> powers given to it under the Mandate. Each question of power must be considered on its own. It may be that certain powers fall within the "sovereignty" of the Mandatory while others may not. An example has already been given which illustrates this point.[58]

It is now proposed to discuss the related question of domestic

jurisdiction of the mandatory. Because of the close relationship between the question of sovereignty and domestic jurisdiction the discussion of the latter questions will also have a bearing on the former. Lastly it is intended to examine some of the acts of the Mandatory in the territory of South-West Africa in the light of the discussion on the nature and extent of the jurisdiction of a mandatory in a mandated territory.

The Domestic Jurisdiction of the Mandatory.

It was submitted above that the Mandatory has exclusive jurisdiction. The extent of its jurisdiction in rather widely defined: "The Mandatory shall have full power of administration and legislation..." over the mandated territory which is to be viewed for this purpose as an "integral portion" of the Mandatory's own territory.[59] In this sense it is argued that possession of a mandated territory is vested in the Mandatory. Hence the old English adage that "possession is nine-tenths of the law" leads to the claim that the Mandatory has sovereignty over its mandated territory. Anglo-American lawyers have tended to favour this result while Civil-law writers have been less inclined to make this inference because Roman-law and modern Civil-law retains a clear distinction between ownership and possession.[60]

However, quite apart from the claim of sovereignty based on possession, the exclusive nature of this "possession" and the wide discretion of the Mandatory have led to the claim that no international body or tribunal can question the exercise by the Mandatory of its discretion inside a mandated territory. If, as *under Article 2 of the South-West Africa Mandate, the mandated territory is to be administered as an "integral portion" of the Mandatory's territory it would seem that prima facie the former* as exclusive possession of and unlimited jurisdiction in the atter. Put in another way, Article 2 brings the territory within ne Mandatory's domestic jurisdiction or extends the Mandatory's here of domestic jurisdiction to the mandated territory.

the Cape Law Society Case[61] which came before the South rican Supreme Court, the issue was whether a judgment in a crimi- l case given in the Courts of the mandated territory of South- t Africa was to be treated as a foreign judgment by the Courts the Union of South Africa. It was held that the relation ween the Union of South Africa and the territory, which was a Mandate, was such that the Court which had given the judgment ld not be regarded as a foreign tribunal, since the Mandatory entitled to administer the territory as an "integral portion" ts territory under Article 22 paragraph 6 of the Covenant.

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In the Cape Law Society Case[61] which came before the South African Supreme Court, the issue was whether a judgment in a criminal case given in the Courts of the mandated territory of South-West Africa was to be treated as a foreign judgment by the Courts of the Union of South Africa. It was held that the relation between the Union of South Africa and the territory, which was a "C" Mandate, was such that the Court which had given the judgment should not be regarded as a foreign tribunal, since the Mandatory was entitled to administer the territory as an "integral portion" of its territory under Article 22 paragraph 6 of the Covenant.

The classical argument is therefore, that if the mandated terri-

tory can be regarded as having been brought into the Mandatory's domestic jurisdiction that jurisdiction is exclusive and unlimited so that no body or tribunal external to the Mandatory's own administrative machinery can question the exercise of its powers within this "reserved domain".

The inference of an unrestricted jurisdiction is however negatived by the terms of the Mandate and also by Article 22 of the Covenant. The inference is negatived firstly by the general philosophy behind the Mandate - to guide the inhabitants of mandated territories along the path of development and eventual self-determination.[62] The Mandatory thus cannot deviate from this objective in its administration of the territory. It is also precluded from administering the territory in its own interests.[63] Secondly, Article 22 paragraph 1 of the Covenant provides that a trust is to be created in favour of "peoples not yet able to stand by themselves". The implication is clearly that the trust involved the preparation of these peoples so that they could "stand by themselves", i.e. to protect these people and to preserve their identity as a distinct community until the time that they were ready to protect and govern themselves. This is clearly inconsistent with the classical domestic jurisdiction argument which is tantamount to an annexation of the territory to the Mandatory's territory. Thus Evatt, J. in Frost v. Stevenson made the following comment: "For my part it is

impossible to believe that the acceptance by the mandatory power of its international trust - 'sacred trust' - in the interests of those who are 'not yet' able to stand by themselves in the modern world is to be regarded as a new mode of 'acquisition' of territory by the mandatory power. I think that it is not right for the Courts of the Mandatory power to hold that the very evil which it was the object of the mandatory system to prevent, namely, acquisition by means of cession or annexation, has been achieved by the terms of the mandate. In my view the terms of the mandate entirely contradict the idea of acquisition, cession or annexation."[64]

The same judge made a similar point in Jolley v Mainka[65]. Even the South African Supreme Court has expressed the view that the territory of South-West Africa had neither been ceded to nor to be annexed by South-Africa.[66]

Thirdly, the Mandatory of South-West Africa was to make annual reports to the Council of the League showing the action taken "to carry out the obligations assumed under Articles 2,3,4, and 5 (of the Mandate)."[67] Further the Mandatory could not modify the terms of of the Mandate without the consent of the League Council.[68] This duty of international accountability and the inability of the Mandatory to modify the terms of the Mandate Agreement imply that the jurisdiction of the Mandatory over its mandated territory was not intended to be unlimited. Wright has

rightly observed that because the mandatory could not resign, transfer or amend the mandate without the consent of the League its powers were severely limited and therefore the Mandatory did not possess sovereignty over the territory.[69]

Fourthly, Article 2 of the Mandate Agreement for South-West Africa corresponds with Article 22 paragraph 6 of the Covenant which expressly states that the mandated territory is to be administered as an integral portion of the mandatory's territory "subject to the safeguards... in the interests of the indigenous population".[70]

The second paragraph in Article 2 of the South-West Africa Mandate provides that "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." This is, as indicated previously, the main purpose of the Mandate System as a whole. The exercise of every individual power in a mandated territory must therefore not be inconsistent with this overall objective .

The notion of an unrestricted authority or an unlimited sovereignty in favour of the Mandatory has been as Wright points out "continually and emphatically opposed by the Mandates Commission, it has been denied but less explicitly by the Council; and the mandatories have in most cases acquiesced."[71]

Finally it is noteworthy that the Permanent Court of International Justice has held in the case concerning the Nationality Decrees in Tunis and Morocco that a state may incur international obligations in respect of matters which might otherwise be solely within its domestic jurisdiction if the state specifically undertakes international obligations in repect thereof.[72] One obvious way of incurring international obligations is for a state to become a party to an international treaty. The Covenant was a multi-lateral treaty just as the Charter of the United Nations is a multi-lateral treaty between the signatory states. The obligations of the Mandatory qua mandatory no longer remained within its domestic jurisdiction and each of its obligations relating to mandates flowing from the Covenant (particularly Article 22) constituted a matter justiciable in international law by virtue of its signature to the Covenant.

Judge Tanaka of the International Court of Justice has defined the contemporary international obligations of South Africa (as Mandatory) which limit its powers over the mandated territory as arising inter-alia from "the Charter of the United Nations (since South Africa is) a member state, the customary international law, general principles of law and other sources of international law enunciated in Article 38 paragraph 1" of the Statute of the Court.[73]

Wright too has held that the sovereign is limited under international law by treaties, including the League Covenant, so "in amending a Mandate in any important particular would usually have to get the consent of other states with treaty-interests."[74]

If the Mandatory's powers were limited by the Covenant then Judge Tanaka's statement regarding the contemporary international obligations of the Mandatory, at least in so far as that statement applies the same rule with regard to the membership of the United Nations by South Africa, must be correct. Indeed, the view prevalent amongst many members of the General Assembly of the United Nations, is that Article 2(7) of the Charter - protecting States from United Nations' interference in their domestic jurisdiction - must be read in conjunction with Articles 55(c) and 56 of the Charter.

Article 55 provides that "the United Nations shall promote:... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Article 56 provides that "all Members pledge themselves to take joint and separate action in cooperation with the Organisation for the purposes set forth in Article 55." In accordance with the principle that domestic jurisdiction is a relative question

depending on the existence of international obligations undertaken by the state concerned it can be argued that the domestic jurisdiction of each Member State of the United Nations is restricted by these clauses in the Charter.[75]

In an analysis of the concept of domestic jurisdiction Waldock has pointed out that the concept might be used (1) either as an objection to the competence of an international agency or international tribunal to examine or look into a given question; or (2) as an objection as to the validity of an international claim on the ground that the claim does not disclose any breach of an international obligation owed to the claimant, be it a state or an international organisation. The author also submits that there is nevertheless an intimate connection between the question of jurisdiction and substantive rights. If a plea of domestic jurisdiction is lodged as an objection to the jurisdiction of an international organisation or tribunal the problem is to reach a conclusion as to competence without deciding the merits, i.e. the substantive rights.[76]

Thus a decision by the General Assembly for example, that any particular question does not fall within the domestic jurisdiction of a state as defined in Article 2(7) of the United Nations Charter does not necessarily imply a breach by that State of an international obligation.

The domestic jurisdiction of a state is confined to those matters not regulated by international law. The boundary cannot be fixed in advance. The boundary alters with the development in the general international law in the area in question. It also contracts or expands for each state according to the particular international obligations including treaty obligations.

The distinction drawn by Waldock between substantive rights and jurisdiction must always be clearly maintained. A refusal by a state to acknowledge an international obligation in a sphere in which it has a concurrent (domestic) jurisdiction on the grounds that its domestic jurisdiction is sacrosanct and inviolable is often based on an imperfect understanding of the concept of domestic jurisdiction. This misunderstanding usually manifests itself in a confusion by that state of the above two aspects of the concept. At the same time a plea that its domestic jurisdiction is being or is about to be infringed gives an air of respectability to what is nothing more than an illegal repudiation of international obligations by what Waldock calls a spurious appeal to the doctrine of the reserved domain.[77]

The fact that Article 2(7) does not apply in the spheres described by Articles 55 and 56 establishes the competence of the General Assembly to discuss the internal affairs of all states

in so far as these affairs fall within the purview of Article 55 and 56. At the same time the competence of the General Assembly to discuss or investigate such questions does not prejudge the **question** as to whether there have been any breaches of these obligations.

Article 55 refers to several objectives of the United Nations which were also the objectives of the Mandate System. For example, "equal rights and self-determination of peoples", "conditions of economic and social progress and development" and "universal respect for and observance of, human rights and fundamental freedoms". The Mandates did not, of course, use the same language but their overall aim was nevertheless substantially similar to that of Article 55.

The U.N. may take cognisance of any matter defined in Article 55, for example, the principle of human rights. This it may do in relation to a mandated territory or the internal affairs of any state. The United Nations has in fact discussed the policy of apartheid (as a human rights problem) applied by the Mandatory in South-West Africa. The Mandatory has taken shelter behind the concept of domestic jurisdiction and denied the competence of the Organisation to discuss the Matter. This has been its position since the beginning of the life of the United Nations; and this attitude has hardened since the United Nations first criticised the policy of apartheid after Smuts had submitted an

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annual report to it in 1946:

"We would not submit reports to the U.N.O. if they asked us a hundred times" said Prime Minister Malan in 1954, "because they have interfered in our domestic affairs."[78]

It has been explained above that such an argument confuses competence or jurisdiction with the question of substantive rights and is therefore inadmissible. The competence of the United Nations exists under Article 55 of the Charter (to which the Mandatory is signatory) and this competence exists independently of the Mandate or the League so that neither the termination of the Mandate nor the dissolution or the League can affect that competence. In this sense the similarity of aims of Article 55 and the Mandate is purely coincidental.

Sovereignty and Domestic Jurisdiction

It has been submitted above that the Mandatory has under normal circumstances exclusive jurisdiction in the day to day administration of the Mandated territory. The foregoing discussion does not affect the validity of this proposition. It should be noted firstly that "exclusive" jurisdiction is not synonymous with "unlimited" jurisdiction.

It was also submitted above that the fact that the Mandatory has

the authority to do one act does not mean that it has general sovereignty to do all acts.[79] Conversely, the fact that the Mandatory does not possess such general sovereignty does not exclude the possibility that certain acts may be within its jurisdiction, nay, exclusive jurisdiction. It follows that if a matter is within a state's exclusive jurisdiction it must necessarily be within its sovereignty. However the fact that a matter is not within the exclusive domestic jurisdiction does not necessarily mean that it is not within this state's sovereignty. On the other hand, an exclusive jurisdiction will not necessarily mean an unlimited jurisdiction.

Thus there is no doubt that a Mandatory has an exclusive sovereign right to administer a territory mandated to it. But that right is subject to certain international obligations accepted by it under the Mandate and Article 22 of the League Covenant. It follows therefore that an act of sovereignty within a State's exclusive domestic jurisdiction can at the same time be an internationally justiciable issue in so far as that act is subject to international obligations.

Cheng has affirmed the same principle in a different context. Discussing the question of nationalisation by a state of property within its territory, Cheng argues that such an act is an act of sovereignty because every State has the sovereign right to

nationalise property within its territory. Yet at the same time he affirms that this right is subject to customary international law and in individual cases, to treaty obligations.[80]

However, Cheng maintains that once a sovereign act is subject to international obligations it ceases to be under the state's exclusive domestic jurisdiction. This has perhaps been by and large the traditionally accepted view. The present writer disagrees with the latter proposition in so far as it has been submitted that an act of sovereignty within a state's exclusive domestic jurisdiction can be subject to international restrictions. But this difference, it is submitted, is more a matter of definition than substance. The present writer defines "exclusive" jurisdiction as not necessarily meaning unlimited jurisdiction whereas Cheng appears to view exclusive jurisdiction as necessarily meaning unlimited jurisdiction. This approach is not, in substance, different from that presently advocated in so far as the submission that an act of sovereignty within a state's exclusive jurisdiction can be subject to international obligations is predicated on the presence of international obligations (under either customary international law or through treaties). Once a state can in relation to a certain act, be proved to be under no such international obligations, the matter cannot be justiciable in international law and in this sense the state's jurisdiction is not only exclusive, it

is necessarily unlimited - a conclusion no different from that reached by Cheng. The only reservation that need be expressed here is that if a state has international obligations over a certain act then, while the act remains exclusively within the State's jurisdiction in the sense that it alone has the competence to do the act, the doing of the act becomes a matter justiciable in international law. Applying this to the Mandatory System it is clear that the mandatory has the exclusive right to administer its mandated territory; however this right is circumscribed by certain international obligations incurred by it under the Covenant - Article 22 (now the Charter - Article 55) not to mention the Mandate Agreement itself. In this sense the Mandatory's exclusive jurisdiction is at the same time limited.

If the question is considered from the point of view of the jurisdiction of international tribunals there appears to be a more fundamental difference between the traditional approach to domestic jurisdiction and the approach suggested by the present writer. Under the latter approach a dispute involving the question whether a sovereign act of state is subject to or governed by international obligations is an international question, and, if only for that reason, justiciable in international law. No plea of "exclusive domestic jurisdiction" can prevent an international tribunal from hearing such a dispute which, in essence, is

international in character. But if a state's exclusive domestic jurisdiction is by definition unlimited (as under the classical approach) it would be impossible for a state to voluntarily restrict rights which are exclusively vested in itself by entering into international accords - a proposition repugnant to even the most fundamental principles of international law nor would it be possible for an international tribunal to decide whether a state is under obligations in doing an act which it claims to be within its exclusive jurisdiction. The deciding of this question can be effectively throttled in limine litis by a mere plea of domestic jurisdiction. If however the tribunal examines the merits of the question - and thus ignores the objections voiced by the state to the jurisdictional competence of the tribunal - and finds that the State is NOT under any international obligations in relation to the act in question, that examination may be challenged to have been ab initio an illegal interference with the State's domestic jurisdiction. Rather than take this risk the tribunal may wish to "let sleeping dogs lie" and shun altogether the task of examining the merits of the question - by declaring that it lacks jurisdiction.

If on the other hand it is accepted that exclusive jurisdiction is not necessarily unlimited then the argument cannot lead to such absurdities. Under this approach, any claim of exclusive

jurisdiction is a matter of proof under international law; i.e. proof as to whether the State has any international obligations in doing the act in question - whether that jurisdiction, albeit an exclusive jurisdiction, is limited or unlimited by international law.

As the Permanent Court of International Justice has held: "to hold that a state has not an exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such matters."[81]

It is submitted that this statement of the Permanent Court embodies the correct approach. Even if exclusive domestic jurisdiction to do certain acts may be limited by international law it does not follow that the State will never have the right to do the act <u>at all</u>. It may be that it may have to be done in a certain way or subject to certain conditions. This would depend on the circumstances of each particular case. In this way, to hold that a State is under an international obligation over a certain act (or to hold that a certain act is not within the exclusive jurisdiction of a State as held in the <u>Nationality Decrees</u> case) does not necessarily mean that the State had no right to do the act in question.

That the Mandatory was to have sole (i.e. exclusive) authority in the administration of the Mandated territory cannot be doubted. No other power not even the League, was to have any kind of concurrent authority in the territory's administration - hence the term "integral portion" in Article 2 of the Mandate for South-West Africa and Article 2 paragraph 6 of the League Covenant. The functions of the League in relation to, for example, the territory of South-West Africa were specified by Article 22 of the Covenant and were limited to the receipt of an annual report from the Mandatory and the examination by a Permanent Mandates Commission of the report, the Commission being entitled to advise the Council of the League on any matter relating to the observance of the Mandate.[82] The only governmental organisation existing in the territory was that which was provided by the Mandatory. In this sense the jurisdiction of the Mandatory was "exclusive", and at the same time it was the sovereign right of the Mandatory to administer.

An undertaking by a State of a certain obligation at the international level may limit its sovereignty in the sense that it should be exercised in a certain way but it is not an abandonment of sovereignty. In fact as the Permanent Court held, the right to enter into engagements is an attribute of sovereignty rather than its negation.[83] Each mandatory was, therefore,

exercising its sovereignty when it entered into the international engagement of developing mandated territories for eventual self-determination under the terms of a mandate. This is notwithstanding the fact that in most cases, for example in the "B" and "C" Mandates, the right to administer was subject to specific obligations such as:

(1) the promotion of the material and moral well-being of the inhabitants of the territories; (2) the control of liquor traffic; (3) the prohibition against forced labour and (4) the prohibition against slavery. By virtue of the fact that these were international obligations the question of the observance by the Mandatory of each of these and other obligations became an internationally justiciable issue. The Permanent Court was accordingly given jurisdiction to decide all questions of the interpretation and the application of the Mandates. The whole institution of Mandate and the individual acts of the Mandatory in this way became amenable to judicial control.

It has been submitted above that under normal circumstances the mandatory has exclusive jurisdiction. Once there has been a breach of the international trust the situation ceases to be "normal", and depending on the gravity of the breach, the body to whom the trust obligations are owed (i.e. the League, now the United Nations) may take remedial actions - perhaps culminating

in the termination of the Mandate and the authority of the Mandatory. Bentwich maintains that the League had the power to terminate a mandate for non-fulfilment of obligations: "... (I)n theory, it would appear that it (i.e. the Mandate) may be revoked by it (i.e. the League) if the Council should find that the Mandatory was not fulfilling its obligations."[84]

Conclusion

The conclusions to be reached from the foregoing is that both the League through its Members and the mandatory had a simultaneous legal interest in the administration of Mandated territories, with the latter having a wide ranging internal jurisdiction (at least in the "C" Mandate territory) while at the same time being strictly accountable to the former. The principle of strict accountability negates any inference that might be drawn from the wide-ranging powers of the Mandatory that the latter possessed sovereignty over its mandated territory. The dominant principle of trust in the concept of mandate also negates such an inference. The combined effect of both the principles of accountability and trust as well as membership of the League and now the United Nations renders the internal jurisdiction of the mandatory in its mandated territory a matter justiciable in international law so that the plea of "domestic

jurisdiction" is of no application. Finally the League, and now the United Nations, can take cognisance of breaches of trust and can take remedial action. Wright puts it this way: "Thus we conclude that municipal law sovereignty in the (mandated) territories is exercised, under the limitations of Article 22 and other treaties, by the mandatory acting with the consent of the League Council, but in case of established breach of duty the League might remove a mandatory and appoint a new one. Responsibility to other states with respect to the territories is vested in the Mandatory, and with respect to certain matters eventually with the League. If we consider this de facto situation in connection with the strong evidence that (present) sovereignty is not vested in the Principal Powers, in the mandated communities, or in the mandatories, and that the League has ultimate power to change the regime through the Covenant amending process, we conclude that it is not far from the truth to say that sovereignty under international law is vested in the League of Nations. This conclusion seems to command the support of a larger number of writers than any other theory, and is also suggested by the term 'mandate' as used in private law. It can hardly be said that vesting of sovereignty in the League violates the non-annexationist formula of the Peace Conference, especially in view of the transitional purpose of this sovereignty...."[85]

This in Wright's view is however only a "tenta
which is "completed" by the statement that "so
(mandated) areas is vested in the League acting through the Covenant amending process, and is exercised by the mandatory with the consent of the Council for eventual transfer to the Mandated communities themselves."[86]

These statements, it is submitted, adequately summarise the uniqueness of the legal position resulting from the Mandate System. They do so without neglecting the primary purpose of the System, namely, the guidance of the mandated peoples towards complete independence in accordance with a pre-determined procedure designed to ensure the eventual fulfilment of the trust.

Wright's interpretation, as the writer himself points out, leads to the conclusion that sovereignty is <u>held</u> by the League while the <u>exercise</u> of sovereignty is divided between the mandatory and the mandated community in proportions which vary according to the terms of the particular mandate. Thus the "A" mandated communities exercise a greater degree of sovereignty than the B and C mandate communities.[87]

The practical consequences of the foregoing theoretical principles is that there is no legal presumption in favour of the exercise of unspecified or unlimited powers by the mandatory in its mandated territory. The governmental authority of the mandatory

is in fact restricted by what Wright has aptly described as the League's own system of "checks and balances". The actual administrative process depended on the co-operation of distinct entities which had their own defined spheres of competence, namely the mandatory government, the League Council, and the mandated community.

Wright observes: "To secure permanence in such complex systems two devices have been used:

(1) a political balance of power and responsibility and (2) a judicially enforced division of power and responsibility. The first is characteristic of British institutions; the second of American. Both are utilised in the Mandates System."[88] Under (1) above the political balance of responsibility is, as previously explained, spread out between the mandatory, the League and the mandated peoples according to the class of the mandate. The mandatory's powers were checked by the principle of accountability of the League and its power to transfer the Mandate in the event of serious or persistent breaches, while the Council's power of supervision was restricted by Article 22 of the Covenant and also, perhaps, by the fact that the Mandatory was represented at the League. The powers of the mandated communities depended on their stage of development as determined by the Covenant. Political controls were however considered to be insufficient on their

own, and were therefore supplemented by a system of control through law - through the Mandates Commission which, although not a strictly judicial body, discharged its functions along essentially legalistic lines.[89] The principal judicial body was of course the Permanent Court of International Justice. The work of both these bodies is discussed in the next chapter and the ensuing chapters in Part II.

Yet the totality of this system of political and judicial control preserved the jurisdiction of the mandatory from bureaucratic or other interference from any quarter so that the jurisdiction of the mandatory remained an exclusive jurisdiction in the sense defined above. At the same time the mandatory acquired its jurisdictional competence under an international regime created by a multi-lateral treaty, and the international institutions and rules thus created imposed certain international obligations on the administering authority so that even though the latter's jurisdiction was exclusive, it was by no means unlimited.

In this way the Mandate System created a new relationship in international law, which modified the old conception of sovereignty by the idea of government on behalf of the League of Nations, with the dual purpose of preparing peoples under guardianship for self-government through a form of international government on the one hand, and of carrying out, during the

the interim period, a trust for their well-being and development.

South Africa as Mandatory

If the actual record of the mandatory's administration inside the territory of South-West Africa is tested against the foregoing principles, it will be seen that South Africa has seriously misconceived the basis of its authority to administer the territory. It appears up to the time of writing to have rigidly adhered to the belief that it has unlimited jurisdiction in the territory which has been (wrongly) regarded as if it were a territory over which South Africa had "territorial dominion." On this assumption, mistaken or deliberate, it has extended its domestic policy of apartheid to the mandated territory.

It is necessary to give some factual information to show the Mandatory's early intention to proceed on the assumption not only that the mandated territory was to be constitutionally and administratively integrated into the Union but also that its internal policy of apartheid could be freely extended for application inside the territory.[90]

The South-West African Affairs Amendment Act of 1949 provided for

the representation of the territory in the Union Parliament and in passing the Act the mandatory "virtually made South-West Africa a fifth province of South Africa".[91] The Native Affairs Administration Act of 1954 transferred control of many administrative matters within the territory to the Union's Minister of Native Affairs. The "native reserves" within the territory were placed under the South African Native Trust.[92]

The Mandates Commission had already expressed its disapproval of the application of the system of Native Reserves and Passes in the mandated territory. For administrative purposes South-West Africa was divided into two zones, an arrangement inherited, with minor modifications, from the former German Administration. These were known as the Police Zone and Tribal areas. (see map). Lying to the south and including nearly five-eighths of the territory, the Police Zone was an area in which only European laws were enforced. This was an area for European residence and which contained most of the wealth of the territory.[93] This area contained, however, eighteen "reserves" into which non-Europeans were segregated. Residence by the indigenous in the European area is even today by permit only, such permits or "passes" are also issued for travel or employment of indigenous people in the European area.[94] This system was criticised by the Permanent Mandates Commission of the League, which declared as contrary to the principles of the Mandate the application by the Mandatory of its

Colour Bar Act to the mandated territory.[95]

Discriminatory practices against the indigenous peoples of the territory gave rise to two revolts in the 1920's. The first was the revolt by the Bondelswart people of the territory in 1922. The revolt was ruthlessly suppressed by the mandatory government which sent in aeroplanes to bombard their reserve. More than one hundred men, women and children were killed in the attack. The other revolt was by the Rehoboth peoples in 1925 who surrendered when the administration was about to order action by its troops and planes. The Permanent Mandates Commission severely criticised these events and the force used by the mandatory. The Commission also found discrimination and forced labour which indigenous people of the territory were subjected to as the cause of the revolts.[96]

The United Nations, predictably, condemned the passing of the above mentioned South-West African Affairs Amendment Act of 1949. Under this Act, the territory was to be represented in the Union Parliament, but representation and franchise were entirely European, though provision was made for one senator nominated by the Governor General for his knowledge of "the reasonable wants and wishes of the coloured races of the territory". The United Nations criticised this for lack of franchise for the indigenous 90% of the population as well as for

its implications of incorporation and the legal aspects involved in view of South-West Africa's international status.[97]

In 1946 South Africa submitted a memorandum to the General Assembly proposing incorporation of South-West Africa. The territory had always been regarded as strategically vital to South Africa, but it was not on this ground on which the proposal was based. The United Nations rejected the proposal and called for the territory to be placed under the United Nations' trusteeship system.[98]

In November 1953, the General Assembly established the Committee on South-West Africa. In doing so it affirmed the 1950 Advisory Opinion of the International Court of Justice on the International Status of South-West Africa, and authorised the Committee to assume a role analogous to the Mandates Commission of the League, i.e. to examine reports and petitions and to make recommendations to the General Assembly.[99] This Committee drew the attention of the General Assembly to other forms of discrimination practised by the mandatory within the mandated territory. Between 1954 and its dissolution in 1961 the Committee submitted annual reports to the General Assembly. It expressed deep concern over the disparity in land allocations between the races in the territory. The Mandatory allotted 45% of the land to Europeans who constituted less than 12% of the population

and 20% to the non-European 88%. Imishue points out that "several reports (of the Committee) claimed that the territory was being administered almost exclusively in favour of the European inhabitants at the expense of the native population, in contravention both of the spirit of the Mandate and the Declaration of Human Rights."[01]

In 1956 the same Committee declared that "the Union of South Africa has failed and continues to fail to carry out the obligation it undertook to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory."[02]

Another riot occurred in Windhoek in 1959 when 170 indigenous families were forcibly removed from their usual area of residence to another area. Police opened fire and 12 people were killed, and 40 were injured. The United Nations condemned this action.[03]

Between 1953 and 1961 the Committee made numerous efforts to bring about a peaceful solution to the South-West Africa problem and made several recommendations to the General Assembly. The General Assembly has itself made numerous calls on the Mandatory to conform with the Mandate.[04] The question of South-West Africa has featured on the United Nations' agendas for 30 years during which numerous attempts have been made by the various

organs of the Organisation to bring about a change of attitude by the Mandatory. It is beyond the scope of this study to examine these.[05] It suffices to note that no progress has been made due to the intransigence of the Mandatory which has continued to administer the territory in circumstances which amount to a virtual annexation of the territory.

The extent of South African control of South-West Africa and of its integration into the Union was accurately summarised by an M.P. for the Namib constituency of the territory in 1956:

".... (T)o sum up all the happenings of 1948-49, what happened is that, between the Union and South-West [06] inter-territorially ... the Union on the one hand ceased to regard South-West as a subordinate mandated territory, and that South-West on the other hand expected to be regarded as an equal partner with the other four provinces.... The term 'mandated territory' disappeared from all our statutes. We no longer talk about the territory of South-West Africa ... consequently we make no secret of it that the question of annexation in the old fashioned sense has lost all practical meaning."[07]

PART II

THE INTERNATIONAL CONTROL OF MANDATES

CHAPTER IV.

SUPERVISION BY THE LEAGUE OF NATIONS

Introduction.

It has already been submitted that the Mandate system was an improvement on all the previous methods of international administration of non-self-governing peoples. One of the essential and novel features of the System which distinguished it from previous efforts was the control periodically exercised by the International Society over the work of the Mandatory. It is for this reason necessary to give a brief introductory description of the precise nature of this supervision and the organs involved.

The League did not act through one special organ only in discharging its supervisory functions over Mandates. It acted through a variety of organs, namely, the Council, the Assembly, the Secretariat, the Permanent Mandates Commission and the Permanent Court of International Justice.

The Council was the authoritative organ of the League in supervising the administration of Mandates. It discussed or accepted or rejected resolutions prepared by a rapporteur.[08] The resolutions made recommendations to Mandatories and they usually simply

endorsed reports submitted to the Council by the Permanent Mandates Commission. This is explained below.

The Assembly of the League also discussed mandates although its main activity in this area consisted of resolutions passed by it and addressed to the Council, the Mandatory Powers and the Permanent Mandates Commission, usually to the latter, thanking it for its work and encouraging it to co-operate with the Mandatory Powers to ensure that Article 22 of the Covenant was observed.[09] The Commission considered every resolution of the Assembly concerning Mandates but avoided deciding the question as to what it would do in the event of a conflict between a resolution of the Council and a resolution of the Assembly. No such conflicts actually arose, and both the Council and the Commission considered a resolution from the Assembly whenever one was addressed to them.

The Secretariat of the League collected and filed information about the deliberations of the Assembly, the Council as well as the replies of Mandatory Powers and their representatives on the Commission to the observations of the Commission. The Secretariat also collected other information for circulation amongst the members of the Commission.[10]

It is now proposed to discuss the function of two of the most highly specialised sources of international control by the League,

the Permanent Mandates Commission and the Permanent Court of International Justice. Although this Court was not an organ of the League it was, as will be seen below, to play an important role in the supervision of Mandates.

I. The Permanent Mandates Commission.

The Commission was established in 1922 as an advisory body responsible to the Council of the League of Nations. The Commission was composed of individuals with experience in administration and international affairs, or as persons of academic eminence, and not as representatives of a particular country. Its Constitution provided that the majority of the members of the Commission should be subjects of countries which were not Mandatory Powers, and all its members were to be independent of the Governments of their country and could not hold a paid office while serving on the Commission.

While the Commission was to supervise the Mandate system it was never meant to be a judicial[11] or executive body and it took no direct part in the administration of the mandated territories.[12] The Mandatory remained responsible to the Council of the League.[13] But the Council itself acted in the first place through the Permanent Mandates Commission, to which the Mandatory submitted annual reports upon the conditions and administration of the mandated territory. After considering the reports the Commission

advised the Council, which then submitted its observations to the Mandatory if it considered that action was necessary. The representative of the Mandatory at the Council could reply to any criticisms contained in the report of the Mandates Commission.[14]

The Mandatory was also required in each case to send to the Commission copies of all laws and regulations and other legislative enactments passed during the year. These were to be examined by the Commission to ascertain whether they were in conformity with the principles of the Mandate System.[15]

If there was any indication that nationals of the Mandatory were to have economic advantages, or if there was any interference with complete freedom of conscience, or if there was any assertion of sovereignty by the Mandatory the Commission would view this as a deviation from the principles of the Mandate System. For example, in considering a report on South-West Africa, the Commission noted a statement of the administrator that the Colour Bar Act of the Union of South Africa was being applied in the territory to employment on railways, and noted that the Act was based on considerations which were incompatible with the principles of the Mandate for the territory.[16] The Commission also noted on a previous occasion that the practice of requiring a religious mission to give a written undertaking to assist and support the Administration of the territory of South-West Africa,

and to encourage those indigenous people under their influence to seek employment in the territory was not altogether in conformity with the spirit of Article 5 of the South-West Africa Mandate. These conditions were accordingly removed by the Mandatory.[17]

Such examination by the Commission of the legislative enactments of mandatories in the mandated territories further showed that their authority flowed not from any territorial "sovereignty" (however defined) but from jurisdictional rights in a foreign territory and that the mandated areas were not within the national domain as defined by national law.[18]

While Article 22 provided for reports, neither it nor the texts of the various Mandates, provided for any right of the inhabitants of mandated territories to petition the League. Such a right was however always presumed to exist, and in 1923 the Council adopted a British proposal to formally recognise the right of petition. As with the annual reports, the Commission presented its observations to the Council as the sole body authorised to make representations to the mandatory.

Any executive action required to amplify or modify the Mandate could only be taken by the Council. The Commission was therefore in no position to be able to dictate to the Mandatories, indeed the Commission had to cooperate with the Mandatory and based its

supervision on the principle of confidence in the Mandatory.[19] Thus when the Mandatory over South-West Africa introduced the practice of segregation in the 1920's inside the mandated territory and began to move the indigenous people into "native reserves" so as to provide a pool of labour for the working of the diamond mines in the territory the most that the Commission could do was to express its concern and hope for an improvement in the future.[20]

Bentwich comments: "If the function of the Assembly of the League (was) to exercise a certain moral influence over the execution of the Mandate system, and the function of the Council of the League (was) to see to the observance of the system, and where necessary, its amplification and modification, the function of the Mandates Commission (was) at once control of and collaboration with the Mandatories. And in regard to the "B" and "C" Mandates, it symbolises and gives effect to the idea of international cooperation in the administration of backward peoples."[21]

A copy of the report of the Commission on the annual report of the Mandatory and the petitions, if any, was sent to the Government of the Mandatory and the Mandatory State could be heard by the Commission through its accredited representative. The minutes of the whole proceedings of the Commission were published for general information, and "in order to secure the assistance of

public opinion in the moral control exercised by the Commission."[22]

II. Judicial Control.

Judicial control was intended to be of two kinds: that exercised by (A) the Court of the Mandatory in the mandated territory itself, and the appellate Court of the Mandatory State i.e. at the municipal level;[23] or (B) by the Permanent Court of International Justice.

A. Municipal Courts.

The first type of control suffers from certain inherent limitations; for it is grounded on the principle that the validity or legality of the administrative acts of the Executive is subject to challenge in a Court of law. This principle further presupposes the existence of an "independent" judiciary. Another limitation is that control over the Executive by a national court may not always be as effective as that exercised by an international judicial tribunal whose proceedings receive world-wide publicity. International public opinion could act as a powerful, if crude, "sanction" when compared with the near total absence of sanctioning machinery against the state within the municipal sphere, where news of proceedings against the State can be easily suppressed, and where the right to institute

proceedings against the State might itself be narrowly restricted if not altogether denied.

As Wright points out, the mandates have not usually been given a legal status superior to ordinances by the central executive authority of the mandatory. In any case as the text of the mandates contained principles couched in very broad terms they became susceptible of wide differences of interpretation and "in such cases a national court is inclined to accept the interpretation by its own political authorities as conclusive."[24]

The tradition that executive acts are finally subject to the ruling of the Courts of law is deeply embedded in the administration of justice in England. For this reason the jurisdiction of national Courts with reference to Mandates has been particularly well illustrated in territories that were mandated to the United Kingdom; for example, Palestine:

In the case of Jerusalem - Jaffa District Governor v. Suleiman Murra[25] the validity of certain legislation passed by the administration of Palestine was challenged. The legislation was passed by the High Commissioner empowering the Municipality of Jerusalem to expropriate certain springs for the purpose of supplying water to Jerusalem from a village nearby subject to compensation paid to the villagers. It was alleged that the legislation was contrary to Article 2 of the Palestine Mandate

which obliged the Mandatory to safeguard the civil rights of all the inhabitants irrespective of race and religion. The Supreme Court, sitting as a Court of first instance, held that the provision for compensation was contrary to Article 2 as it did not safeguard the civil rights of villagers, and that the legislation was null and void as it violated "principles of sound legislation". The Government of Palestine appealed to the Judicial Committee of the Privy Council in England. The Privy Council reversed the judgment of the lower Court. The Court chose to give Article 2 a very restrictive interpretation in that it found the operative words in Article 2, to be "irrespective of race and religion" so that Article 2 was viewed as not covering civil rights generally. The implication was that civil rights would be protected by Article 2 only from racial and religious discrimination and that if civil rights were violated Article 2 afforded no protection unless that violation was due to racial or religious discrimination.

Bentwich cites a number of instances when courts within the mandated territory of Palestine have been called on to pronounce on the validity of legislation vis-a-vis the Mandate.[26] In all these instances however the questions were concerned more with the interpretation of a section of the mandate or the disputed legislation, and litigation was intended primarily to clarify the rights of the Jewish and Arabic communities of Palestine rather

than to exercise control on the powers of the Mandatory. The cases demonstrate another limitation: that their jurisdiction was based on English legislation, namely, the Palestine Order in Council of 1922, by which civil government was established in Palestine.[27] In one of these cases the facts were as follows:[28] The word Palestine was printed on the postage stamps in the three official languages, English, Arabic, and Hebrew. However along with the Hebrew text appeared the initials "E.I.", signifying "Eretz Israel" or the "Land of Israel". This aroused intense nationalistic feelings among Arabs who interpreted this as a veiled recognition of the most extreme Zionist aspirations and an effort was made to enjoin the use of these initials on the ground of incompatibility with the Mandate provision that "any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew, any statement or inscription in Hebrew shall be repeated in Arabic".[29]

The High Court of Palestine was asked to issue a writ of Mandamus against the Postmaster-General. The Court however declined the writ holding that it had "no power to enforce the terms of the Mandate on the Administration, save in so far as they were incorporated in the Palestine Order in Council."[30] As the Order in Council made no provision for the enforcement of the Mandate in so far as it affected the executive acts of the Government the Court could not enforce the terms of the Mandate against the Administra-

tion.

Even the Supreme Court of Palestine refused to grant the injunction on the ground that the form of the word Palestine in each language was a matter of administrative discretion.[31]

Wright, commenting on the attitude of the Palestinian Courts towards the interpretation and application of the Mandate, in the light of the above cases says that the Courts presumed that the Mandatory government "in performing political and administrative acts (had) correctly interpreted the rather vague terms of that instrument. In other words, interpretation of the Mandate (was) largely intrusted to the political rather than the judicial arm of the mandatory. It may be noted however, that the interpretative authority given to the Permanent Court of International Justice indicates that the mandates were intended to be documents susceptible of judicial interpretation."[32]

Two other cases, decided by the South-African Supreme Court, cited by Bentwich under the heading of "Judicial Control" are not in fact illustrative of "control" of the Mandatory's powers by its own national courts. The two cases, Rex v. Christian and Cape Law Society v. Van Aardit will not be discussed in this section; they have instead been cited elsewhere in different contexts to illustrate the points for which these cases are considered to be the most useful.

The civil government of the Mandated territory in Tanganyika was established by three Orders in Council - one in 1920 and two in 1926. A legislative council for the territory was established, but neither of the three Orders mentioned the Mandate. There was therefore no provision limiting the powers of the legislative body - a fact which was pointed out by the Permanent Mandates Commission.[33] Indeed, the Colonial Secretary even made statements claiming that the territory was "part of the British Empire". This was, naturally, criticised by the Commission.

The Order in Council establishing the Legislative Council provided that ordinances could be made subject to the laws and customs of the indigenous people. There was however, no explicit guarantee that the Mandate would be observed and no provision was made for judicial review.[34]

The Orders in Council of 1923 establishing civil government in Togoland and Cameroons did however make reference to the Mandates for these territories and provided that any law in conflict with the Mandate in question would be void.[35]

The difficulty of judicial control at the municipal level in all the above-mentioned territories was of course that mandates were judicially enforceable only to the extent that the Orders in

Council made them expressly enforceable. Thus Wright comments, ".... in British law local legislation repugnant to orders in council organising the local government are void, but... one Order in Council may ordinarily be overruled by a later .... Since treaties are not ordinarily per se sources of law in British Courts, it appears that the mandate texts are British law applicable by the Courts only in so far as they have been expressly made so by the Orders in Council... but since the power of the Crown to legislate by Orders in Council under the Foreign Jurisdiction Act is practically unlimited the continued applicability of the mandates is not in any sense guaranteed by the Courts as against the subsequent acts of the Crown in Council."[36]

However even where the Courts of the Mandatory inside the Mandated territory could take cognisance of the mandate they were obliged to accept the interpretation of the executive as conclusive.[37] Under the Foreign Jurisdiction Act 1890,[38] the opinion of the Secretary of State was made conclusive on the Courts as to the "existence or extent of any jurisdiction of Her Majesty in a foreign country".

Wright thus concludes: "... it is clear that their execution (i.e. execution of the provisions of the mandates) can never be completely guaranteed by the law and the (municipal) Courts alone.

Carrying out of their spirit will inevitably be in large measure a problem for executive and administrative discretion."[39]

It can be seen from the foregoing that the work of the Courts of the Mandatory itself was not such as to require them to serve as a useful mechanism of control over the Mandatory's administration. The contemporary position of the territory of South-West Africa, with the presence therein of South Africa, the original Mandatory, further shows that the internal judicial system of the Mandatory is completely impotent in all questions touching on the legality of the governmental authority of the Mandatory or even of some of the powers exercised by it under the purported authority of the Mandate. The judicial system of South Africa and of the territory of South-West Africa is in fact an essential apparatus for the maintenance of the apartheid system in both territories. As such it is incapable of effectively ensuring that the Government of the Republic of South Africa does not deviate from the principles of the Mandate System and the terms and the spirit of the Mandate.

Even though the presence of an Order in Council had the effect of rendering the Mandate enforceable only to the extent that it was recognised to be enforceable, the absence of an Order in Council could possibly have led to the idea that the Mandatory's

powers were unlimited. For example, in the case of the authority of the Mandatory in South-West Africa, no Order in Council was passed for its establishment. This might well be a contributory fact to the development of the attitude by the Mandatory that it has unlimited powers in the territory and is not responsible to any external body.

Territories mandated to the dominions of New Zealand, Australia and South Africa were, as indicated above, Western Samoa, New Guinea and South-West Africa respectively. The civil governments in the latter two territories were <u>not</u> established by any order in council based on the Foreign Jurisdiction Act. As a result these governments were based solely on legislation of the Parliaments of Australia and South Africa.[40] Yet the legislative powers of dominions were limited to peace order and good government. In view of this Wright has observed that a "question might be raised of the legality of this extra-territorial legislation by the dominions."[41]

Governing authority in South-West Africa was established by the Peace Treaty Act.[42] Another Act of 1922 transferred the railways and harbours of South-West Africa "in full dominion to the Union of South Africa." Certain other Acts applicable only to the Union were extended for application to the mandated territory.[43]

The absence of a basic Order in Council has probably fostered the

attitude that the Mandatory's administration was not responsible to the Crown and that the Mandatory was for this reason the sole authority in and possessing full sovereignty over the mandated territory. This attitude has even filtered into the judiciary.

In Rex v. Christian Judge de Villiers in the South African Supreme Court claimed that South Africa as mandatory "is not in any respect subject to the Imperial Parliament."[44] The same judge argued that sovereignty over the territory was not vested in the League but in the Mandatory.

Another Judge in the same case said: "There is no question (here) of respondeat superior. Once having elected to hand over South-West Africa to the Union of South Africa the League of Nations as such (had) no right or power to dictate to the mandatory power what laws (were) to be established in South-West Africa and how it (had) to be governed."[45]

B. International Judicial Control.

For the foregoing reasons international judicial control such as that offered by the Permanent Court of International Justice and its successor the International Court of Justice, has a better potential for preventing breaches of the mandate by the Mandatory. This is because international proceedings are well-publicised and are capable of mobilising public opinion to an extent

far greater than, for example, any form of domestic adjudication is capable of.

Within the context of the Mandate System there were two kinds of international supervision and control, that exercised by the League through its Council (which in turn acted on the advice of the Permanent Mandates Commission), and that exercised by the then sole permanent international adjudicative body, the Permanent Court of International Justice. The work of the Council and the *Mandates Commission was perhaps intended to be the dominant source of control over the System; this was described above.* Attention shall now be focussed on international judicial control of Mandates.

International legal control was meant to be complimentary to the control of the Council, which was essentially a political body. The Permanent Court of International Justice (the P.C.I.J.) was recognised by the Mandates as the final interpreter of their terms. By these instruments:

"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."[46]

This was one of the "securities for the performance of the trust" referred to in Article 22 paragraph 1 of the Covenant of the League. This Article listed a number of devices through which the effective fulfilment of the trust would be supervised, but it did not mention the P.C.I.J. This however is not of any significance since the Mandate texts did provide for the jurisdiction of the P.C.I.J.

In so far as the Court was the final and supreme interpreter of the terms of the Mandate and in so far as every Mandatory had agreed in advance to the compulsory jurisdiction of the Court in all disputes relating to the interpretation or application of Mandates the Court must be acknowledged as amongst the most important of the "securities" for the performance of the sacred trust of civilisation.

There can of course be procedural difficulties in regard to the jurisdiction of international adjudicative tribunals. One reason for this is that the present state of international law permits international tribunals to have jurisdiction over states only on a consensual basis. Because of this states are free to impose any number of limitations to the tribunal's jurisdiction and these limitations might well be so restrictive as to render its jurisdiction almost nugatory.

In relation to the International Mandate System however, the problem of obtaining the consent of the Mandatory States to submit to the jurisdiction of the P.C.I.J. was successfully overcome by the compulsory insertion of a clause giving the Court a fairly wide-ranging jurisdiction. However this clause has given rise to a host of jurisdictional problems for international adjudication of disputes relating to Mandates. These problems constitute the subject-matter of the discussion in the next four chapters.

CHAPTER V:

JURISDICTIONAL PROBLEMS IN THE INTERNATIONAL JUDICIAL CONTROL OF MANDATES - THE P.C.I.J.

The Mavromatis Palestine Concessions Cases illustrate the way in which the jurisdiction of the P.C.I.J. could be compulsorily invoked. It is proposed in this Chapter to review these cases with special attention to jurisdictional issues.

The Mavromatis Cases

The P.C.I.J. was called no less than three times to give judgment on the interpretation of an Article of the Palestine Mandate (Article 11), which was concerned, among other things, with the grant of concessions in the mandated territory.

The Government of Greece instituted proceedings before the P.C.I.J. against Great Britain on the basis of Article 26 of the Mandate for Palestine.[47] It was alleged on behalf of the Greek Government that Great Britain had infringed Article 11 of the Mandate by granting certain concessions for the generation and distribution of electric power to one Rutenberg when in fact, a Greek national, Mavromatis, had a concession given by the Turkish Government prior to the outbreak of the war. It was alleged that

the Rutenberg concessions violated the original concession given to Mavromatis.

Article 11 of the Palestine Mandate gave the Mandatory "full power to provide for public ownership or control" of natural resources or public works "subject to any international obligations accepted by the Mandatory."

It was admitted that Article 26 of the Mandate came within Article 36 of the statute of the P.C.I.J. which extended the latter's jurisdiction to matters "specially provided for in conventions or treaties in force", and that Greece had satisfactorily complied with Article 40 of the Statute and Article 35, paragraph 2 of the rules prescribing the formalities for invoking the Court's jurisdiction. But Great Britain objected to the jurisdiction of the Court on the ground that there was no dispute between the two Governments but only a dispute between a Greek subject and the Government of Palestine; that there was no preliminary attempt to settle the dispute by negotiation; and that, in any case, the dispute was not with regard to the interpretation or application of the Mandate for Palestine. The Court, however found in its judgment of 1924[48] that: (1) There was a dispute between the states since Greece had the "right to ensure, in the person of its subjects, respect for the rules of international law";[49] (2) that this was a dispute which could not be settled by negotiation because it was apparent that deadlock

had been reached between the two Governments; and (3) that since Great Britain had agreed by Protocol XII of the Treaty of Lausanne to maintain concessionary contracts concluded before October 29, 1914, and since part of the Mavromatis concession came within that description, it appeared that "international obligations accepted by the mandatory" and consequently, the application of Article 11 of the Palestine Mandate were involved. The Court therefore found that it had jurisdiction and subsequently passed on the merits in 1925.[50] It sustained the contention of Greece with regard to the validity of some of the concessions but not with regard to compensation claimed on behalf of Mavromatis.

It should be noted however, that the jurisdiction of the Court could only be invoked because the interpretation or application of a provision of the Mandate i.e. Article 11, was called into question. If no question had arisen as to the application of a term of the Mandate the Court would have been incapable of exercising jurisdiction. This is illustrated when, in 1927, the Court was again presented with an issue arising out of the Mavromatis concession.[51] In accordance with the 1925 decision Great Britain had readapted the concession by granting new concessions in 1926 which cancelled the original Mavromatis concession. Mavromatis, however, alleged that delays by the Palestine Authorities in the execution of the new concessions

had amounted to their cancellation causing him serious losses for which he sought damages. The Greek Government tried to negotiate with Great Britain but the negotiations failed and the Greek Government invoked the jurisdiction of the Court. Great Britain again objected to its jurisdiction and this time it was successful. The Court upheld the objection that there was no genuine difference as to the interpretation or application of the Mandate, but only a claim for breach of contract, and therefore the Court had no jurisdiction. The Court endorsed its 1924 judgment and held that the circumstances surrounding the grant to Rutenberg amounted to the exercise of the full power to provide for "public control" within the meaning of Article 11 of the Mandate.[52] The Court however emphasised that this did not mean that the grant of a concession by itself was an exercise of the full power in question.[53] The Court approved its holding of 1924 that it could have had jurisdiction solely on the ground that the act in question fell within Article 11 in relation to which the Court had jurisdiction under Article 26 of the Mandate.[54] In view of this the Court examined the act complained of in the 1927 case to decide whether it fell within Article 11. It thus examined whether the alleged delay of the High Commissioner in approving the plans which Mavromatis had to submit under the 1926 contracts constituted an exercise of "the full power to provide for ... public control" under Article 11 of the Mandate. The Court found that

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this was not an exercise of the power of public control but was more of an administrative power.[55] As the act in question did not fall within Article 11, the Court had no jurisdiction to hear the matter under Article 26 of the Mandate.

It was open to the concessionaire, if he complained of breach of contract by the Government of Palestine, to sue in the Courts of that country for damages. It was not however open on these grounds to invoke the intervention of his country or the jurisdiction of the Court on the plea that there had been a violation of the Article of the Mandate.[56]

II. An Appraisal of the Mavromatis Cases.

The 1927 decision shows that the jurisdiction of the P.C.I.J. was restricted to only those questions which involved the interpretation or application of the Mandate for Palestine.[57] On the other hand although the jurisdiction of the Court was so restricted, it at the same time emphasised the essentially supervisory function of the P.C.I.J. in the Mandate System and shows that the Court was the final instrument of control, for the decision of the Court was meant to be decisive and binding on the parties.

The decisions taken together show that a mandatory could be brought before the Court by the unilateral arraignment of another Member of the League on questions involving the inter-

pretation or application of a provision of a Mandate. Moreover, any Member could adopt before the P.C.I.J. the claim of its national and seek the interpretation of the Court if the Mandatory was thought to have contravened it. Unfortunately, the P.C.I.J. never had the opportunity to decide whether every member of the League could be considered to have a legal interest in the observance of the Mandate, entitling it to invoke the jurisdiction of the Court even where no citizen and no material interest of its own was involved. It will have been noted that the Court was conferred jurisdiction not only in questions involving the "application" of Mandates but also their "interpretation". The former presupposes the existence of a breach by the mandatory - for only then could a dispute as to the "application" of a mandate arise. Any question involving the mere "interpretation" of a mandate on the other hand, does not necessarily presuppose a breach by the Mandatory. there is an instance where no breach is committed then no injury could result either to a state or any of its nationals.

t there could still be a dispute as to the "interpretation" of e mandate between the state and the mandatory and, it is subted, that such a matter would have been one fit for submission the Court. It may be observed however that in most cases even stions of "interpretation" would only have arisen within the text of a breach and a consequential injury or threat of injury

to a state or its national.

Wright suggests that it is possible to argue that the "interests of every Member of the League in maintaining the complete integrity of the Covenant and the Mandate is sufficient" to permit any League Member to invoke the Court's jurisdiction even if its interests (or those of a national) were not affected.[58]

There are certain dicta in the Court's judgment of 1924 which, it is submitted, support this conclusion:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its rights to ensure, in the person of its subjects, respect for the rules of international law.

"The question, therefore, whether the present dispute originates in an injury to a private interest... is irrelevant from this standpoint."[59]

The implication is that it is unnecessary that the state bringing an international claim must suffer a cognate <u>injuria</u>. It is sufficient that - at least in so far as it concerns international treaties - the state instituting proceedings proves a breach of international law as established by an international instrument

to which both the applicant and respondent states are parties.

In this sense the legal interest of the State is "sufficient" to vest in the applicant State the capacity to bring the claim. The term "sufficient interest" is however a question of degree. For example, a breach of a treaty which is multi-lateral can affect (a) a material interest as well as (b) a legal (non-material) interest. Under either (a) or (b) a State will have a *"sufficient interest" provided that it can establish the* factual basis of its claim. Yet a claim under (a) is more onerous than a claim under (b). This becomes obvious when it is noted that under (a) the facts which the applicant State must prove to establish its legal interest are (1) that the applicant and respondent States are signatories of the treaty in question, (2) that the respondent State has committed a breach of the treaty, and (3) that the breach has resulted in a material injury either to the applicant State or to one of its nationals, whereas in a claim under category (b) the facts to be established are (1) that the parties are both signatories to the treaty and (2) that the respondent State has committed a breach of that treaty.

There is however a third category (i.e. (c)) where the applicant state may have an additional right to invoke the jurisdiction of an international tribunal even if no breach is

committed if the instrument in question expressly confers the right to invoke compulsory international judicial process for the interpretation of any provision of the instrument. In the latter case the proceedings would be against any State party to the instrument which opposes the particular interpretation proposed. Thus in category (c) either of the two opposing states could institute international proceedings against the other without there necessarily being any breach of the instrument committed by the party against whom proceedings have been instituted. Here again the applicant State would have a "sufficient interest". A claim under this third category not only indicates that the question of sufficient interest is a question of degree but also shows the bearest minimum of legal requirements which suffice to vest in the applicant State the capacity to bring an international claim: Thus a claim under the first category is more onerous than a claim under the second or third categories, while a claim under the second category is more onerous than one under the third category but less onerous than a claim under the first category, and lastly, a claim under the third category is the least onerous since all that the applicant State need do to establish its legal interest is prove that both States parties to the proceedings are signatories to the treaty and that they have differing interpretations on any part of it.

One reservation might however be expressed to the above inter-

pretation of the dicta of the 1924 judgment already quoted. It may be argued that the Court said that a state has the right to ensure respect for the rules of international law "in the person of its subjects" - that such right is limited to instances where its subjects (or nationals) have been injured. Against this it may be argued that this cannot be a correct construction of the Court's holding, taken as a whole, firstly because the Court went on to expressly hold that "whether the present dispute originated in an injury to a private interest ... is irrelevant...."; and secondly because it is well established that a state can institute international proceedings against another state for an injury done to itself (not to any particular national).

It is necessary to distinguish between three juridical dimensions of international litigation:

(1) Litigation resulting from State A suing State B for a material injury done by the latter to the former; i.e. the injury is of a public nature. For example, a warship of State A negligently colliding with a warship of State B in international waters - category (a) above.

(2) Litigation resulting from State A suing State B for a material injury done by State B to a national of State A ; i.e. the injury is of a private nature, as happened in the Mavromatis

case - category (a) above.

(3) Litigation resulting from State A suing Sate B for breach of an international treaty to which both are signatories but without any material injury to State A or to any of its nationals, as would be the case under category (b) or (c) above.

Any particular instance of international litigation (from which international arbitration must be distinguished) will take at least one of the above three froms. The Mavromatis case falls primarily in (2) above, as the injury complained of was of a private nature and what was sought was a redressal of the alleged injury. However, the dicta quoted above from the majority opinion in the 1924 judgment seem to indicate that the case is also a candidate for (3) above.

On the other hand, Lord Finlay's dissent from the 1924 judgment of the majority appears to indicate that, in his opinion, the case did not even fall under the second category, let alone the third. He was of the view that Article 26 of the Palestine Mandate could not be made applicable to a dispute between an individual and a Mandatory state merely by the intervention of the Government of which the individual was a subject. For the Court to have jurisdiction there would have had to be a dispute between the two Governments before the application was made,[60] i.e. the case should have fallen in the first category. Lord

Finlay concluded that there was no dispute between the two Governments; but he did admit that "there are many cases in which a genuine dispute between two nations has originated in a wrong alleged to have been done to the subject of one of these two nations by the other."[61]

This statement in the context of international adjudication within the Mandate System, i.e. litigation based on a mandate clause similar to Article 26 of the Mandate for Palestine, indicates that a purely private injury could form the basis of international litigation if the injury leads to a dispute between two or more governments. In view of this admission, it is difficult to understand why Lord Finlay found no dispute between the Greek and British Governments.

Lord Finlay makes no explicit reference to the question whether a state could invoke the jurisdiction of the P.C.I.J. on the basis of a breach of Mandate by the mandatory but without there being any cognate injury either to the state invoking jurisdiction (i.e. for a public injury) or to any of its nationals (i.e. for a private injury). However, the tenor of his arguments makes it unlikely that he would entertain any argument to the effect that a mandatory could be compulsorily brought before the P.C.I.J. by a state which has suffered neither a public nor a private injury but which alleged a breach of the Mandate by the former.

Thus Lord Finlay appeared to contemplate that international judicial settlement within the Mandate System would fall only in the first, and possibly, also in the second category above, but never in the third. Whereas the majority of the Court in the 1924 judgment appear to have held that it could fall in the first, second and also possibly in the third category.

Even if the words of the 1924 judgment quoted above are not susceptible of the interpretation leading to the conclusion that a mandatory could be sued for a mere breach of Mandate regardless of injury, this proposition can still be maintained on other grounds. The preliminary objection to the jurisdiction of the P.C.I.J. together with the preliminary counter-case filed by Great Britain in June 1924 itself admitted that "it would have been open to any Member of the League to question provisions in those (i.e. Mr. Rutenberg's) concessions which infringed the international obligations which his Britannic Majesty as Mandatory for Palestine had accepted."[62]

This is quite consistent with and, in fact, flows naturally from the philosophy behind Article 22 of the League Covenant under which advanced nations were to discharge the sacred trust. Before going into the relevant sections of that Article it is necessary to recall the traditional dogma that duties of states, even if for the benefit of individuals, are owed under international law

not to individuals but to other states. It is further helpful to investigate how far this dogma holds true in the protection of dependent peoples and minorities under international law generally. Although ordinarily the state to which the duty is owed is the state of which the individual is a national, "if the individual benefitted is a national of the State which owes the duty, as is true under various treaties protecting natives and minorities, the duty is owed to the other parties to the treaty."[63]

The Covenant of the League of Nations can be regarded as one such international treaty protecting the rights of indigenous inhabitants and minorities amongst them. In relation to the people in the mandated territories each Mandatory undertook certain international obligations specified in Article 22. The inhabitants possessed a unique status in international law as they were not "nationals" of any particular state but they remained under the jurisdiction of the mandatory. For this reason the other signatories to the Covenant must be deemed to have acquired the rights corresponding to those obligations undertaken by the mandatories. Otherwise these prescriptions would not be "obligations" and the effect of the clause in the Mandates conferring jurisdiction to the P.C.I.J. would be unduly restricted.

It is obvious that all signatories to the Covenant endorsed their faith in Article 22 on the premise that all the contracting states

had a real interest in the protection of non-self-governing peoples and minorities. All parties agreed that the "principle (of) the well-being and development" of the people of "those colonies and territories which as a consequence of the (late) war ... ceased to be under the sovereignty of the states which formerly governed them" should be applied to such territories. The implementation of the above principle was the raison d'être of the mandate system under which the obligations of each mandatory were listed in its respective Mandate as the best method of discharging the principle.

For these reasons the statement in the British counter-case of 1924 that any Member of the League could question the Rutenberg concessions if they infringed the mandatory's international obligations under the mandate was based on sound legal principle. It is further submitted that under the Mandate System any Member of the League had the right to invoke the jurisdiction of the P.C.I.J. upon breach of a Mandate by the Mandatory regardless of whether the breach resulted in injury to that state itself or its nationals. Such a conclusion has, as will be seen below,[64] important juridical consequences for future international litigation, particularly that concerning mandated territories in the post-1945 era.

Another conclusion to be drawn from the Mavromatis cases is that the jurisdiction of the P.C.I.J. rested in the final analysis on

the principle of consent. This proposition was as true in the case of the P.C.I.J. as it is today in the case of its successor, the I.C.J. The former emphasised this point in the 1924 judgment of the Mavromatis case.[65]

In view of the principle of consent the P.C.I.J. in the above judgment considered whether Protocol XII of the Lausanne treaty, which was an international instrument more recent than the Mandate for Palestine, could be deemed to have overruled the provisions of the Mandate.[66] It was argued on behalf of Great Britain that Article 26 of the Mandate was not applicable and that the only international instrument dealing with recognition of concessions in Palestine was Protocol XII which did not in any way show consent of Great Britain to the jurisdiction of the P.C.I.J. in disputes relating to the interpretation or application of that Protocol.[67]

The Court found that its jurisdiction under Article 26 remained unaffected by the Protocol. Its reasons were that Article 11 of the Mandate itself referred to the Protocol (i.e. the words "subject to any international obligations accepted by the Mandatory" in Article 11 were construed to refer to the Protocol) and the latter became applicable to the case before the Court because of Article 11 which was the immediate source of its jurisdiction. In this respect the Protocol was "the compliment of the provisions of the Mandate in the same way as a set of regulations

alluded to in a law indirectly form part of it."[68] While the provisions of the Mandate relating to jurisdiction were in the Court's opinion, applicable only in so far as they were compatible with the Protocol, the reservation regarding international obligations in Article 11 - which made it clear that they were to be respected - could not be construed to have any limitative effect as regards the provisions of Article 11.[69] The silence of the Protocol concerning the Mandate could also not be construed as excluding the jurisdiction of the Court. The Court explained:

"Though respect for Protocol XII ... is assured by Article 11 of the Mandate, the provisions of Article 26 definitely establishing the jurisdiction of the Court in disputes relating to Article 11[70] cannot be in any way affected by the silence of the Protocol regarding this jurisdiction."[71] This jurisdiction was of course confined to disputes relating to the interpretation or the application of the Mandate.

The conclusion to be drawn from the foregoing is that the Court derived its jurisdiction from the Mandate, and not any other document, and that consent of the mandatory to its jurisdiction was clearly established therein.

Two more points regarding jurisdiction in the Mavromatis cases deserve mention although they do not directly relate to the

question of consent.

The first is whether the P.C.I.J. could be said to have validly assumed jurisdiction in 1924 in view of the fact that Protocol XII was not in force at the time when Greece filed its application.[72] The Treaty of Lausanne and Protocol XII were not ratified until August 1924. Indeed, Article 36 paragraph 1 of the Statute of the P.C.I.J. provided that the jurisdiction of the Court comprised all cases referred to it by the Parties and "all matters specially provided for in treaties or conventions in force". The British objection to jurisidction based on the fact that the Protocol, invoked by the Greek Government, had not become operative was perhaps well-founded in a technical sense since at the date of the application by Greece, the Protocol as part of the Lausanne Treaty, was not "in force" within Article 36, paragraph 1 of the Statute of the P.C.I.J.

The Court however held that as the effect of Protocol XII was intended to cover legal situations dating from a time previous to its own existence it was to be regarded as guaranteeing rights recognised in it against any violation regardless of the date at which it may have taken place.[73] The fact that Article 11 of the Mandate was not yet effective in May 1924 was immaterial since the subsequent ratification of the Protocol in August 1924 cured any irregularities and imparted legal force to Article 11.[74]

Thus the Court consistently maintained that the source of its jurisdiction was the Mandate itself - particularly Article 26 which established the jurisdiction of the Court in disputes relating to Article 11.

However, if the immediate source of the Court's jurisdiction was Article 11, this clause had to be applicable to the dispute not only ratione materiae but also ratione temporis. This was the final question to be considered by the Court. The Court observed that as the Mandate was in force at the date of the filing of the Application (May 1924) it had jurisdiction in view of the rule of interpretation that "jurisdiction based on an international agreement embraces all disputes referred to it after its establishment."[75] Besides this Article 26 laid down that "any dispute whatsoever... which may arise" shall be submitted to the Court.

"The reservation made in many arbitration treaties regarding disputes arising out of events prior to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the (above) rule of interpretation...."[76]

Finally, the Court held that even if it was essential that the act alleged by Greece to be contrary to the Mandate should have been done when the Mandate was in force, this condition was fulfilled.

If the grant of the Rutenberg concessions was a breach of the Mandate that breach subsisted at the time of the Application regardless of the date when it was first committed.

Both these two questions considered by the Court, particularly the latter, show that the Court had always viewed the source of its jurisdiction as the Mandate itself. In so far as the Mandatory had consented to the jurisdiction of the P.C.I.J. in Article 26 of the Mandate for Palestine the two questions are indirectly related to the main and all-important principle of consent.

III. Some Specific Criticisms About the Mavromatis Judgments.

As the issue of jurisdiction featured so prominently throughout the entire case,[77] attention shall here be focussed on the Court's handling of the issue of jurisdiction.[78]

It is submitted that the major flaw in the Court's reasoning was its inability to distinguish clearly the governing article in the Palestine Mandate regarding its jurisdiction.

On the one hand the Court was faced with Article 26 of the Mandate which stated categorically that any dispute whatever relating to the interpretation or application of the Mandate was to be submitted to the Court. On the other hand the Court was consistently labouring under the impression that Article 11 was the

basis of its jurisdiction because Protocol XII of the Treaty of Lausanne was an "international obligation" within Article 11. *This created an ambiguity which the Court never really* solved. The passage which is most illustrative of this is that in which the Court is about to answer the question whether the mandate may have been superceded by the Protocol:

"Before considering whether, and, if so, to what extent, the jurisdiction of the Court under Article 26 might be affected by Protocol XII, it should be observed that as has already been established, Article 11 refers to Protocol XII. This international instrument must be examined by the Court not merely as a body of rules which may limit its jurisdiction, but also and above all as applicable under the terms of Article 11 of the Mandate which is the very clause from which the Court derives its jurisdiction."[79]

The Court can be seen to be making reference simultaneously to "the jurisdiction of the court under Article 26" and Article 11 of the Mandate as the "very clause from which the Court derives its jurisdiction".

It would appear to be reasonable to hold that the governing clause concerning jurisdiction was Article 26 rather than Article 11 which contained no provision regarding jurisdiction. The Court appears to have reversed this proposition in so far as it

basis of its jurisdiction because Protocol XII of the Treaty of Lausanne was an "international obligation" within Article 11. This created an ambiguity which the Court never really solved. The passage which is most illustrative of this is that in which the Court is about to answer the question whether the mandate may have been superceded by the Protocol:

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It would appear to be reasonable to hold that the governing clause concerning jurisdiction was Article 26 rather than Article 11 which contained no provision regarding jurisdiction. The Court appears to have reversed this proposition in so far as it

recognised Article 11 as the governing clause. It is because of this reversal that it found itself unable to exercise jurisdiction in 1927. Its reason then was that the act complained of by Greece was not the exercise of the "the full power to provide for ... public control" within the terms of Article 11.[80]

It can surely be argued that whether or not the act complained of fell within the terms of Article 11 was par excellence a question concerning the "interpretation or application" of the Mandate and as such the Court clearly had the jurisdiction under Article 26 to decide the matter. Moreover it would have been possible to hold this in the 1924 and 1927 cases without offending the sentiments of the majority of the Court in each case regarding the question of consent; for then the jurisdiction of the Court would still have been based on the same instrument, namely, the Mandate, which contained the consent of the Mandatory, to submit to the jurisdiction of the P.C.I.J.

However, despite the clear-cut nature of the above question as one of the "interpretation or application" of the Mandate under Article 26, the governing article, the Court in 1927 ended up, in effect, by overruling that same Article by a specific interpretation of another article (Article 11) of the Mandate.

It was submitted earlier that the P.C.I.J., as the ultimate

authority for the interpretation of the terms of every Mandate, was intended to be among the most important of the "securities" for the performance of the sacred trust. In recognition of this the jurisdiction conferred on the P.C.I.J. by the appropriate jurisdictional clause of each Mandate was the broadest possible: "..... if any dispute whatever should arise... relating to the interpretation or the application of the provisions of the Mandate...."

It was therefore quite inconsistent with the principle behind Article 26 for the Court to negative its effect by an individual interpretation of Article 11. To quote Judge Nyholm: "This rule (i.e. Article 26) established as a guarantee for the Powers a system of control which ensures that the Mandatory will act in conformity with the provisions of the Mandate.

"The intention underlying the Mandate was certainly not that the clear general rule as to jurisdiction inscribed in Article 26 concerning any question of 'interpretation and application' of the Mandate should be capable of being overruled by specific interpretations of the different articles."[81]

Moreover, the interpretation given by the Court to Article 11 is in itself of questionable value because of its vagueness: "....(W)ithin the limits fixed by Article 11, power to provide for public control does not mean all the rights generally recognised

as belonging to any public administration for the safeguarding of public interests;and that the conception of 'public control' must be construed in relation to Article 11 and to the programme for economic development contemplated therein. It also follows that the question whether, in any given case, there has been an exercise of the full power to provide for public control is essentially a question that can only be decided for each particular case as it arises."[82]

In accordance with this rather unhelpful "test" the Court was somehow able to conclude that the circumstances surrounding the act complained of in 1924 were such that the act was an exercise of the full power of public control within Article 11 and that the circumstances in the 1927 case were such that the act complained of then was merely an administrative act rather than an exercise of a full power of public control. This is particularly difficult to understand in view of the fact that the 1927 case was really a continuation of the 1924 action where the Court had judged itself competent to exercise jurisdiction and had subsequently held the Mandatory to be in breach. That the 1927 case was a mere continuation can be deduced from the fact that after the 1925 case the parties were under an obligation to readapt the Mavromatis concessions. This was done but execution of the new contract was delayed, allegedly due to the

fault of the Palestinian authorities. The Greek application in 1927 was merely that the case should be taken up again by the P.C.I.J. for the allocation of damages. Thus regardless of the merits of the 1927 case, it is submitted that the Court contradicted itself on the jurisdictional issue as decided by itself in 1924.

However, independently of whether or not the 1927 case was a coninuation of the 1924 case, the Court can be said to have had jurisdiction in 1927 within the terms of its own interpretation of Article 11 of the Mandate in 1924.

When Mavromatis was given new concessions in 1926 after the 1925 judgment, the Administration of Palestine was exercising the full power of public control because these new concessions concerned the development of a public utility and the utilisation of natural resources.

On the other hand, the readaptation of the old concessions was an "international obligation" of the Administration since it had been decided by the P.C.I.J. that there had been a breach by the Mandatory requiring a readaptation.

The Palestine Administration was therefore under an international obligation not to do anything which might prevent the readaptation and effective execution of the Mavromatis concessions. This

was in fact the crux of the complaint; it was alleged in 1927 that effective execution was prevented by the Administration of the Mandatory. If the grant of the new contract in 1926 was the exercise of a full power of public control then it had to be subject to the international obligations as provided by Article 11, one of those international obligations being effective readaptation.

It followed that regardless of the merits of the case (i.e. without pre-judging whether or not the Palestine Administration prevented the effective execution of the new Mavromatis concession) the problem involved the interpretation and application of Article 11 which, owing to its relationship with Article 26 conferred jurisdiction upon the Court.

This line of argument for conferring jurisdiction upon the Court via Article 11 AND Article 26 was criticised above by the author. Such a line of argument is however used here solely to illustrate that the 1924 and 1927 Judgments of the P.C.I.J. are logically inconsistent; that it was logically possible to adopt the same line of argument regarding jurisdiction in 1927 as it was in 1924, and that since the same line was not adopted in 1927 the two cases are inconsistent.

In Judge Nyholm's opinion, even if the 1927 case was a new and independent case, it was nevertheless identical with the first, so that the Court should have had jurisdiction in both cases.[83]

Judge Nyholm also expressed the fear that "the same ground which enables the judgment to find in Article 11 a restriction upon the jurisdiction would enable also to find such a restriction in the other articles of the Mandate, and the result would be that the Mandatory would become more or less free from control by the Powers."[84] Jurisdiction would then be confined to cases in which it was possible to discern an action on the part of the Mandatory which consisted of the exercise of a certain power of control. As regards any other action on the part of the Mandatory, the Court would have had no jurisdiction.[85]

Observes Judge Nyholm:

"In the case under consideration the actions by the Mandatory which are in question have not regard to the grant of a concession, but are actions which would result in the annulment of the rights of M. Mavromatis to obtain a definite concession. As regard these actions, the Court would thus have no jurisdiction. It is obvious that the Mandatory may choose the methods of taking action that he wishes, but it follows that by the choice of his own line

of action a Mandatory may abolish the jurisdiction of the Court, an inadmissible proposition. Moreover, generally speaking, it may be said that if the jurisdiction of the Court, set up as a guarantee for the nations, is found, as regards concessions, to be limited to the sole grant of such a concession, and this having regard to the special conditions particular to each case, and according to the surrounding circumstances of such grant, this is a conclusion which appears to be inacceptable. Indeed, the jurisdiction of the Court as regards the Mandate should be general, subject to specific exceptions. The reason underlying the judgment admits the jurisdiction of the Court as an exception, which signifies in reality a cancellation of Article 26."[86]

CHAPTER VI.

JURISDICTIONAL PROBLEMS IN THE INTERNATIONAL JUDICIAL CONTROL OF MANDATES - THE I.C.J.

Advisory Jurisdiction

This Chapter deals with only the Advisory jurisdiction of the International Court of Justice. Contentious jurisdiction is dealt with in Chapter VII.

The discussion is with reference to the South-West Africa cases. As indicated above, this Chapter is an appraisal of only the jurisdictional problems involved in the international judicial control of the Mandate System. Attention shall therefore only be focussed here on the South-West Africa cases in so far as they relate to the question of jurisdiction. A more detailed critique on the broader issues in these cases follows in the next three Chapters.

The jurisdiction of the I.C.J. to entertain suits and to give advisory opinions concerning the Mandated territory of South-West Africa must be viewed within the overall context of international supervision built into the Mandate System. Of the four Advisory Opinions given by the Court on South-West Africa only the 1950 and 1971 Opinions illustrate jurisdictional issues. Accordingly, only these two cases are discussed in this Chapter.

I. The 1950 Opinion on the International Status of South-West Africa

The 1950 Opinion marked the beginning of efforts at the International level to exercise international judicial control on the Mandatory of South-West Africa when the dispute between the United Nations and the Mandatory had fully crystallised without there appearing much chance of an amicable settlement.

The General Assembly of the United Nations requested the Court to give an advisory opinion, inter-alia,[87] on the following question:

"(a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa, and, if so, what are those obligations?"[88]

In answering this question the Court considered whether the new international organisation created by the Charter of the United Nations could exercise supervisory powers previously exercised by the League of Nations over the Mandates. The Court answered the question in the affirmative for the following reasons: The obligation incumbent upon the Mandatory state to accept international supervision was an important part of the Mandate System, and it was designed to ensure the effective implementation of the sacred trust of civilisation.[89] The necessity for

supervision continued despite the disappearance of the original supervisory organ, and therefore the obligation of each Mandatory to continue to submit to supervision also continued.[90] The United Nations' international trusteeship system was designed to meet the same necessity and therefore the organisation had inherited the powers of supervision of mandated territories.[91] In the Court's opinion this was confirmed by Article 80 paragraph 1 of the Charter of the United Nations. This maintains the rights of states and the terms of existing international instruments until the territories in question were placed under the Trusteeship System of the United Nations, and also by Article 10 of the Charter giving the General Assembly very wide powers. Thus it was the General Assembly which was the competent organ of the United Nations for the exercise of the international supervision. In support the Court cited a resolution of the League of Nations passed on 18th April, 1946 which stated that although the League's functions over mandated territories would come to an end, Chapters XI, XII and XIII of the Charter of the United Nations embodied principles corresponding to those declared in Article 22 of the League's Covenant.[92]

In the Court's opinion the General Assembly had now acquired the right to receive annual reports and the mandatory had an obligation to render such reports to the General Assembly and to transmit petitions to it.[93] The degree of supervision of the

new body was not to exceed that which was exercised under the Mandate System and had to conform as far as possible to the procedure followed by the League Council.

This was (in the Court's opinion) the basis of the non-legal (or political) supervision of the United Nations. It has, of course, only an indirect bearing on the jurisdiction of the I.C.J. for which other reasons were given by the Court, and which will be discussed presently. The above reasoning of the Court has been summarised here for two reasons. Firstly because it establishes the jurisdiction of the United Nations as a form of international supervision, and in so far as the functions of the P.C.I.J. and the I.C.J. must be viewed within the overall context of the international supervision of Mandates because the Courts themselves were to be a source of international supervision, the legal basis of the supervision of the United Nations is certainly relevant to the jurisdiction of the two Courts. Secondly, the Court based the legality of United Nations' supervision on the necessity for continued international supervision from another source in the absence of the League. The same necessity must also operate for international judicial supervision by the I.C.J. in the absence of the P.C.I.J. The Court in 1950 did not restrict this necessity to supervision by the United Nations alone; indeed the finding by the Court that it too had acquired the supervisory jurisdiction of its predecessor (the P.C.I.J.)

indicates that the Court regarded the same necessity as operating in favour of the jurisdiction of the I.C.J. over the control of Mandates. The findings of the Court regarding its own jurisdiction are now discussed.

"According to Article 7 of the Mandate (for South-West Africa), disputes between the Mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1 of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions."[94]

This was, in the Court's view, how it acquired such jurisdiction. The above statement raises two main questions and one subsidiary question that are of interest to the jurisdictional competence of the International Court of Justice. The first important question is the precise nature of the jurisdiction described by the Court above as "compulsory". The second main question concerns the international status of the Mandate; the

Court made an oblique reference to the latter question by citing Article 37 of the Statute and Article 80 paragraph 1 of the Charter. The subsidiary question is whether in the light of the pronouncements of the Court in 1950, the current members of the United Nations have a right to invoke the jurisdiction of the I.C.J. over the mandate in contentious proceedings regardless of whether or not they were former members of the League; or whether the words "any dispute... between the Mandatory and another Member of the League" in the jurisdictional clause of the South-West Africa Mandate should be understood to mean that today, since the League is dissolved, only those states who were at one time Members of the League can invoke the jurisdiction of the I.C.J. The first and the last questions will be dealt with before the second question is discussed.

The "Compulsory" Jurisdiction of the Court

The sense in which the term "compulsory" jurisdiction is understood is different from that in which the Court used it, and it is submitted that the Court's use of the term is *prima facie* misleading and that an examination of the reasons adduced by the Court as the basis for its jurisdiction reveals that the Court did not intend to use the term "compulsory jurisdiction" in the strict sense. The reasons given by the Court on the issue of

jurisdiction have already been summarised above and will not be repeated here. Suffice it to say that the Court regarded Article 7 of the South-West Africa Mandate as the origin of its jurisdiction. However the Mandate was an international document in which the Mandatory (South Africa) evinced its consent to the P.C.I.J. having jurisdiction over disputes concerning its interpretation and application (Article 7). In this sense, South Africa had voluntarily agreed to grant the P.C.I.J. jurisdiction over a specific matter, the interpretation and application of the provisions of a Treaty (assuming for the moment, that the Mandate was an international treaty in force). The jurisdiction of the P.C.I.J. was then voluntarily transferred to the I.C.J. by South Africa under Article 37 of the Statute of the I.C.J. when its government became a signatory to the Charter - of which the Statute is an integral part. This jurisdiction of the I.C.J. would have been non-existent <u>but for</u> the fact that the government of South Africa was a signatory to the Charter. Therefore, the true import of the term "compulsory jurisdiction" as used by the I.C.J. is that South Africa, having consented to confer jurisdiction to the I.C.J. over a specific matter by signing an international treaty (i.e. the United Nations Charter) was estopped from denying to the Court that same jurisdiction which it had voluntarily conferred in respect of the same matter.

One may therefore quite safely say that despite the rather strong terminology used by the Court, it was not making any departure from the convention that has been hitherto regarded as fundamental to any form of binding international adjudication, and one that was affirmed by the P.C.I.J. in the Mavromatis case of 1924, namely that an international tribunal cannot adjudicate in a dispute (i.e. it cannot have jurisdiction to hear the case) unless the defendant state has given its consent.

In the case of the I.C.J. this consent may be given for the exercise of its jurisdiction in contentious cases (i) by a special or ad hoc agreement;[95] (ii) by references in treaties or (iii) by a prior declaration under Article 36 of the Statute. Under (iii) the degree of consent is less than in (i) or (ii).

However, in the 1950 Opinion, the I.C.J. was not exercising its contentious jurisdiction but is advisory jurisdiction and in the exercise of such jurisdiction, the consent of every state involved is not a pre-requisite. It is only in contentious cases that consent must be shown. Indeed even the P.C.I.J. has stressed that it would not give an advisory opinion over what was in fact a contentious issue without the consent of the affected party.[96]

Chapter IV of the Statute of the I.C.J. dealing with Advisory Opinions, does not at any stage require consent from interested

states for the Court to exercise such a jurisdiction. Article 66 requires that "all states entitled to appear before the Court" should be notified but there is no additional requirement of consent from them. Under Article 65 the I.C.J. may be seised of a matter on "any legal question at the request of whatever body... authorised by... the Charter of the United Nations...." The authorised bodies are the General Assembly or the Security Council or any specialised agency authorised by the General Assembly.[97]

If the Court can become seised of a matter independently of any state entitled to appear before the Court, consent cannot be a prerequisite for the Court's exercise of its advisory jurisdiction. This has been definitively confirmed by the I.C.J. itself in the case concerning the "Interpretation of Peace Treaties":

"The consent of states, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States... no state, whether a member of the United Nations or not, can prevent the giving of an Advisory Opinion...."[98]

If the statement of the I.C.J. in the 1950 South-West Africa Opinion quoted above[99] regarding its jurisdiction derived from Article 7 of the Mandate by virtue of Article 80 paragraph 1 is

to be understood as a statement pertaining to future litigation between states concerning the interpretation or application of the Mandate then it represents a plausible argument in view of the demise of the P.C.I.J. If however the statement is understood to be a reference to the Court's advisory jurisdiction, it is out of context.

The better view appears to be to treat the statement as an effort by the Court to catalogue the international obligations of South Africa in reply to the first question put before it by the General Assembly. On the other hand, it may be contended, in the 1950 Advisory Opinion on South-West Africa the Court had not moved as far away from the Eastern Carelia Case as it had in the Peace Treaties Opinion, i.e. on the question of consent.

It was perhaps due to the contentious nature of the problem that the Court took the trouble to explain how it acquired what was loosely called "compulsory jurisdiction". The explanation of the Court can also be viewed as not so much an explanation of whether or not the jurisdiction was "compulsory" but as an explanation as to the fact of jurisdiction i.e. whether or not the Court did in fact have jurisdiction to adjudicate in a matter provided by a treaty (the Mandate) whose validity came in doubt after the dissolution of the League of Nations.

Despite the contentious nature of the case however the notion of consent was misconceived for as stated in the Peace Treaties case an advisory opinion may be given even if the Opinion relates to "a legal question actually pending between states", and no state can prevent the giving of an advisory opinion.

Moreover, just as the idea of consent was misconceived in the 1950 South-West Africa Opinion, the reliance by the Court on Article 7 of the Mandate as the origin of its jurisdiction was inappropriate. This Article refers only to disputes between the Mandatory State and another member of the League; i.e. disputes between two entities both of which are states, which means CONTENTIOUS disputes. Whereas the Court was exercising only its advisory as opposed to contentious jurisdiction. The Court not only relied on the survival of Article 7 but also its applicability to the case before it. But even if the Mandate (and consequently Article 7) had survived, the applicability of Article 7 to the advisory jurisdiction of the I.C.J. remains open to challenge.

A better argument for the Court's jurisdiction exists which dovetails neatly with the broad framework of the Court's views on the survival of the sacred trust of civilisation and the securities for the implementation of the trust. With regard to the former the Court held that its original object and raison d'être

remained and did not depend on the existence of the League. With regard to the latter the Court held that the necessity for supervision continued despite the disappearance of the supervisory organ and that the supervisory authority now belonged to the General Assembly of the United Nations.

These arguments rest on the premise that the original object of the Mandate for South-West Africa survived the dissolution of the League, and therefore certain consequences followed. The same argument emphasising the original purpose of the Mandate could have been employed to support the holding that the I.C.J. had the jurisdiction to give the Advisory Opinion in 1950.

It was said above that the principles applied by the Court to the jurisdiction of the United Nations also have a bearing on the jurisdiction of the I.C.J. as another source of international supervision. The Court did not develop this argument but its holding permits this conclusion to be inferred. Whether the Court intended such an inference to be drawn is unlikely because it relied on another argument for its jurisdiction, namely the survival and applicability of Article 7.

The P.C.I.J. was one of the most important securities for the preformance of the trust, and therefore, if supervision was meant to be such an essential part of the Mandate, the I.C.J. can be deemed to have inherited the jurisdiction of its predecessor on the same

basis and in the same way that the General Assembly inherited the Powers of the League Council. This is of course without prejudice to the argument regarding contentious jurisdiction via Article 7 of the Mandate and Article 80 paragraph 1 of the Charter, and Article 37 of the Statute.

There is the authority of the Court itself - although in a much later case - when such an approach was adopted on the question of inheritance by the I.C.J. of the jurisdiction of its predecessor, the P.C.I.J. In the case concerning the Barcelona Traction, Light and Power Company[01] the Court had to decide whether it had jurisdiction on the basis of a treaty containing a clause conferring jurisdiction on the Permanent Court. It was argued that the dissolution of the P.C.I.J. made it impossible to apply that provision.[02] But the Court found on the contrary that the Permanent Court "was merely a means for achieving that object", - namely, judicial settlement; while it was true that the P.C.I.J. no longer existed, the Court held, the obligation remained "substantively in existence, though not functionally capable of being implemented", and if another tribunal were "supplied by the automatic operation of some other instrument by which both parties are bound", the clause would again come into force.[03] The important thing was the purpose and not the instrument. Consent to the transfer of powers resulted from membership

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of the United Nations.[04]

The principle of this argument is of great relevance to the jurisdictional competence of the I.C.J. in matters arising from Mandates. It provides an adequate juridical basis for the I.C.J.'s Advisory Opinion of 1950 and it is also one reason which establishes the contentious jurisdiction of the I.C.J. in addition to Article 7 of the South-West Africa Mandate.

It now remains to enquire whether any member of the United Nations may invoke contentious proceedings against a Mandatory concerning the interpretation or application of a Mandate. Under Article 7 of the South-West Africa Mandate any Member of the League could do this. The Court made it clear in 1950 that Article 7 had survived the dissolution of the League by virtue of Article 80 paragraph 1 of the Charter and that the Court had jurisdiction under Article 37 of its Statute. Article 37 provides that when a treaty provides for reference of a certain matter to the P.C.I.J., the matter shall "as between the parties to the present Statute" be referred to the I.C.J. In addition to this, Article 93 paragraph (1) of the Charter lays down that "all members of the United Nations are ipso facto parties to the Statute of the International Court of Justice." If the source

of the jurisdiction is Article 37 of the Statute then it would appear that any member of the United Nations - even one which was not a member of the League - can invoke the jurisdiction of the I.C.J. on any question concerning the interpretation and application of a Mandate since the words "as between the parties to the present statute" do not require the state invoking jurisdiction to be a former member of the League in addition to being a member of the United Nations.[05]

Ballinger views the body of the 1950 Opinion of the Court as another source of support for the conclusion that even members of the United Nations who were not members of the League can invoke the jurisdiction of the I.C.J. over Mandates. He cites Professor Lauterpacht, himself a former Judge of the I.C.J., who has described the "central theme" of the Opinion as being that the obligations of the Mandatory were "binding not only in relation to the original contracting parties - whether these be members of the League of Nations or the Council of the League of Nations - but also in relation to the International Community at large, independently of the existence of the League...."[06]

Ballinger comments: "It was this interpretation of obligations to the international community at large which led the Court to conclude - by twelve votes to two - that the supervisory functions formely exercised by the League now fell to be exercised

by the United Nations, and unanimously that the competence to determine and modify the international status of the territory rests with the Union of South Africa acting with the consent of the United Nations. This being the case the Court could hardly be expected now to deny any member of the United Nations access to Articles 7 of the Mandate and 37 of the Statute of the Court."[07]

The second main issue raised by the 1950 Opinion is now discussed.

The Juridical Status of the Mandate for South-West Africa

Even if the Court had validly derived its (advisory) jurisdiction from Article 7 of the Mandate, this could only have been so if the Mandate was an international treaty. The writer treats the terms "international treaty" and "international convention" as synonymous terms.[08] The Court did not deal with this question directly although there was an oblique reference to it in the Opinion when the Court explained the source of its jurisdiction.

The Court cited Article 7 and then considered Article 37 of its Statute as well as Article 80 paragraph 1 of the Charter and deduced therefrom that it had jurisdiction. It is once more necessary to quote the relevant parts of the latter two provisions.

Article 37 of the Statute provides:

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

Article 80 paragraph 1 provides that "nothing in this Charter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

The Court alluded to the question of the international status of the Mandate in so far as it referred to Article 37 of the Statute and Article 80 paragraph 1 of the Charter both of which respectively refer to a "treaty or convention in force" (i.e. international treaties) and "the terms of existing international instruments". The Court however did more than just allude to the question; it in fact answered it. The answer is implicit in the Court's holding that it had jurisdiction. The Court's argument as to jurisdiction presupposes (1) that the Mandate was an international treaty; (2) that it was in force; and (3) that the League had treaty-making powers since only then could the Mandate

be an international "treaty or convention in force" within Article 37 of the Statute of the I.C.J.

It would be difficult to arrive at any other conclusion. Even the framers of the League Covenant envisaged that the Mandate documents would have international status. It was explained elsewhere how the Mandate System created a new relationship in international law by establishing the principle of government on behalf of the League, with the dual purpose of preparing peoples under guardianship for self-government and of establishing a trust for their well-being and development together with international supervision and control as safeguards for effective implementation of the trust.[09]

The obligations established and accepted by the Mandatories were international in character. Thus the entire System could only operate on the international plane; so that regardless of whether or not the League had treaty-making power - every Mandate thus created possessed a unique international status.

All the "B" and "C" Mandates incorporated clauses establishing the jurisdiction of the P.C.I.J. in disputes concerning their interpretation or application. In view of such a clause the P.C.I.J. acquired jurisdiction over each Mandate under Article 36 of its Statute which extended its jurisdiction to "matters specially provided for in treaties and conventions in force".

The only conclusion to be drawn from the incorporation of the jurisdiction clause in the Mandates is that they were intended by the League as well as each individual Mandatory State to be international instruments having the force of law and that the League was to have an international personality - at least for the execution of the new System.

This was confirmed as far back as in 1924 when Greece brought an action against Great Britain in the Mavromatis Case. The Greek Application was grounded on Article 26 of the Palestine Mandate which was the clause establishing the jurisdiction of the P.C.I.J. The international status of the Palestine Mandate was never questioned. Indeed Great Britain admitted that Article 26 of the Mandate fell within Article 36 of the Statute of the Court. The Court said:

"The Parties in the present case agree that Article 26 of the Mandate falls within the category of 'matters specially provided for in Treaties and Conventions in force' under the terms of Article 36 of the Statute...."[10]

The only questions then remaining were, in the Court's opinion, whether the conditions laid down by Article 26 in regard to the acceptance of the Court's jurisdiction were satisfied, i.e. whether the dispute related to the interpretation or application of the Mandate and whether this was a "dispute between the Manda-

tory and another Member of the League."[11]

The fact that the Court entertained the Application and gave judgment indicates that the Court itself regarded the Palestine Mandate as an international instrument. The following passage from its 1924 judgment confirms this: "It must in the first place be remembered that at the time when the opposing views of the two Governments took definite shape (April 1924), and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of the opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever... which may arise' shall be submitted to the Court."[12]

The use by the Court of the term "international agreement" followed by the quotation of Article 26 of the Mandate for Palestine shows clearly that the Court itself regarded the Mandate as possessing the character of an international treaty.

In conclusion it is necessary to examine the status of mandates in <u>contemporary</u> international law. If the League had international personality, at least in so far as the implementation of the Mandate System was concerned, the question now arising is whether the mandates subsist despite the dissolution of the

League, or whether a bilateral international treaty can be valid even after one of its parties no longer exists. It is unlikely that a treaty would remain valid after the demise of one of its parties. According to this principle it should follow that each mandate was discharged upon the dissolution of the League. However, in the case of the Mandate System different circumstances exist which lead to the contrary conclusion. If there is such a rule that a treaty lapses when one of its Parties ceases to exist, it applies only to instances when there is no succession by another entity to replace the original Party. In the case the League another international organisation was clearly intended to succeed it. This was the United Nations. This is so particularly with regard to the administration of mandated territories.

Justice Hidayatullah writing in 1967 as Judge of the Indian Supreme Court observed in relation to the South-West Africa Mandate that "there is nothing to show that the principle pacta sunt servanda as a norm of international law and the legal basis of treaties was to be abandoned because one international body was dissolved and another was founded in its place."[13] In this way the treaty (i.e. the Mandate) survived.

The Assembly of the League of Nations itself, in its resolution of April 18, 1946, gave expression to a similar view. It recognised

that the League's supervisory functions with regard to the mandated territories would come to an end but it noted that Chapters XI, XII, and XIII of the Charter of the United Nations embodied principles similar to those declared in Article 22 of the League Convenant. It also noted the intentions of the mandatory states to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the Mandatories. In the opinion of the I.C.J. "this resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations."[14]

The United Nations too passed similar resolutions in the three years immediately after the League Resolution.[15] Lord McNair referring to the 1950 Opinion of the Court on the question of the survival of the Mandate says: "A Mandate is essentially a treaty containing many dispositive provisions and it is not surprising that the Court should have pronounced in favour of its survival."[16]

It is possible to adapt the major portion of the I.C.J.'s 1950 Opinion relating to its answer to the first question: The obligation of each Mandatory as embodied in its Mandate represented "the very essence of the sacred trust of civilisation",

that their raison d'être and original object existed independently of the League and could not be extinguished merely because the supervisory organ had ceased to exist; that Article 80 paragraph 1 of the Charter expressly preserves the rights derived from and the terms of international instruments existing in 1946 until, in the case of Mandates, their incorporation into the Trusteeship System of the United Nations; and finally the consequential survival of the jurisdiction clause in every mandate and the transfer of that jurisdiction to the I.C.J. in the light of Article 37 of its Statute and Article 80, paragraph 1 of the United Nations Charter.[17] All these arguments lead to one conclusion: Each Mandate was intended to be an international instrument and continues to be so as long as its basic objective remains unfulfilled.

The United Nations Secretariat has also asserted that an international obligation remains valid "so long as there is no cause for its extinction"; that the extinction of an obligation cannot be presumed but must be proved. One way of proving this would be to show "the disappearance of the object of the obligation."[18] If an obligation has not lapsed, for example because its purpose remains to be fulfilled, the document which gives expression to that obligation cannot have lapsed.

In 1962, when the I.C.J. was again called upon to deal with the

South-West Africa problem,[19] it was argued before the Court that the Mandate was not an international engagement since it was not registered in accordance with Article 18 of the Covenant which provided that "no such treaty or international engagement shall be binding until so registered".

The Court rejected this argument by holding that if this were so the Mandate was void ab initio so that the Mandatory never had any authority to administer at all;[20] this implied, of course, that each and every Mandate was a nullity from the beginning rendering the entire Mandate System meaningless. Moreover as the Court pointed out, Article 18 provided for registration of "every treaty or international engagement entered into hereafter by any Member of the League", the word "hereafter" meaning after January 10, 1920 when the Covenant came into force; whereas South Africa had accepted the Mandate in May 1919.[21]

It is obvious that the rationale for the rule in Article 18 was the desirability of publicising inter-state agreements and to prevent the conclusion of secret treaties. As far as the Mandates were concerned, they received sufficient publicity; they actually constituted one of the most important questions of post-war settlement. The terms of the mandates were extensively debated within the Council of the League.[22] Further, Article 7 of the South-West Africa Mandate and other similar Mandates[23]

provided that the Mandate be deposited in the archives of the League and that their copies be sent to all signatories of the Treaty of Peace.

The conclusion of the Court was of course that: "The Mandate in fact and in law (was) an international agreement having the character of a treaty or convention."[24]

Judge Jessup in a separate opinion in the same case said that "nothing in the form - or formlessness - or novelty of the Mandate, militates against its being considered a 'treaty'."[25]

II. The 1971 Opinion

Before proceeding to the contentious jurisdiction of the I.C.J. a brief reference may be made to the Advisory Opinion on "The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)".[26]

The Security Council of the United Nations requested the Court's opinion under Article 96 of the Charter on the following question:

"What are the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?".

South Africa appeared to raise an objection disputing the jurisdiction of the Court by contending inter-alia - that the relevant legal question before the Court was actually a dispute pending between South Africa and other states.[27] In support the Eastern Carelia Case was cited where the Permanent Court declined to rule upon the question referred to it because it was directly related to the main point of a dispute actually pending between two states.

The Court rejected this argument holding that in the Eastern Carelia Case one of the states concerned was not a Member of the League of Nations and did not appear before the Permanent Court. In the instant case, the Court held,[28] South Africa, as a Member of the United Nations, was bound by Article 96 of the Charter which gave the Security Council power to request advisory opinions on "any legal question". Moreover, South Africa had appeared and argued its case before the I.C.J.

The Court further held that it was not making a finding that there was a legal dispute pending between two or more states.

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consequences and implications of these decisions."[29]

In the Court's Opinion the fact that the Court would pronounce on "legal issues upon which radically divergent views exist between South Africa and the United Nations does not convert the present case into a dispute...",[30] and the Court would not in principle refuse a request for an advisory opinion especially since under Article 92 of the Charter it is "the principal judicial organ of the United Nations".[31]

Having established that it was properly seised of the matter, the Court proceeded to deal with the question of the Security Council. The answer of the Court is not of any relevance from the point of view of jurisdiction and it will not therefore be discussed here. It suffices to say that the Court affirmed its Opinion of 1950 and held that the General Assembly, as the new supervisory body, validly terminated the Mandate for South-West Africa,[32] and consequently, that other states were under an obligation not to do anything that was inconsistent with the resolution of the General Assembly terminating the Mandate and the subsequent resolutions of the Security Council supporting the action of the General Assembly.

What is relevant to the issue of jurisdiction is the fact that the Court considered itself competent to pronounce on the validity of the above resolutions. The Court affirmed that the resolutions

of the Security Council were valid as that organ had acted in the exercise of its "primary responsibility" of maintaining peace and security,[33] and were binding on members of the United Nations in view of Article 24 and 25 of the Charter.

The Court thus pronounced on the validity of the resolutions of the General Assembly and the Security Council, although it took care to point out before doing so that the Court had no power to examine the legality of all resolutions of the United Nations:

"Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject matter of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from these resolutions."[34]

It appears that the Court was of the view that if the nature of a question put before it for advisory opinion required it, the Court would pronounce on the validity of the resolutions of the organs of the United Nations. In the case before the Court, the Court could not pronounce on the legal consequences for states without

considering the validity of the above resolutions because the "legal consequences" which the Court was asked to define, were postulated upon the validity of these resolutions. In other words, the Court considered itself unable to state the consequences of acts whose validity was assumed a priori, without examination of the legality of the origin of those acts.

In this way the Court considered itself to have the jurisdiction to examine the validity of the resolutions of the United Nations, but at the same time pointed out that it had no general authority of judicial review of United Nations' resolutions.

This rather cautious approach of the Court would seem to be somewhat at variance with an earlier statement made by the Court in the Certain Expenses of the United Nations Case: "The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to hamper or fetter the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion."[35]

It is however possible to distinguish the above statement from the

issue faced by the Court in 1971 on the ground that the latter concerned the competence the Court to pronounce on the legality of the resolutions of the United Nations organs which could have far-reaching implications, whereas the issue in the former case was not nearly as delicate, for it concerned not the power of the Court to strike down declarations of the organs of the United Nations but the power of the Court to examine questions with the aim of facilitating its own decision-making process.

CHAPTER VII.

JURISDICTIONAL PROBLEMS IN THE INTERNATIONAL JUDICIAL CONTROL OF MANDATES - THE I.C.J.

Contentious Jurisdiction.

I. The 1962 and 1966 Judgments.

It is now proposed to deal with the contentious jurisdiction of the I.C.J. with reference to the South-West Africa problem. The Court has to date, delivered two judgments on South-West Africa. This was in connection with contentious proceedings instituted by Liberia and Ethiopia against South Africa on the same *vexata quaestio* of its breach of Mandate.

In 1962 proceedings were initiated by Ethiopia and Liberia against South Africa on the general grounds that South Africa was in breach of its Mandate and had failed to advance the material and moral well-being of the inhabitants of the territory, and that the policy of *apartheid* was a violation of Article 2 of the Mandate and Article 22 of the Convenant of the League.[36] To these proceedings South Africa raised preliminary objections to the effect that the I.C.J. had no jurisdiction to hear or adjudicate upon the case on the ground that Ethiopia and Liberia had no *locus standi* in the contentious proceedings before the Court. The South African argument was that the Mandate for South-West

Africa never was or at any rate, since the dissolution of the League was no longer "a treaty or convention in force" within Article 37 of the Statute and that neither Ethiopia nor Liberia was "another member of the League of Nations" as required for locus standi by Article 7 of the Mandate and that there was no "dispute" within Article 7 since no material interests of either Ethiopia or Liberia were affected,[37] and finally that the alleged dispute was not one which could not be settled by negotiation as provided by Article 7.

Having held that the Mandate for South-West Africa had the character of a treaty or convention at its start[38] the Court considered whether the Mandate including Article 7 was still in force. The Court endorsed its Opinion of 1950 and found that South Africa's obligation under Article 7 to submit to international supervision continued despite the disappearance of the supervisory organ and that Article 37 of the Statute of the I.C.J. and Article 80 paragraph 1 of the Charter preserved Article 7 of the Mandate so that it was still in force. In thus endorsing the 1950 Opinion the Court remarked that "nothing has since occurred that would warrant the Court reconsidering it." The Court held that due to the survival of Article 7, South Africa was under an "obligation" to accept the jurisdiction of the Court. The term "obligation" was not used to denote compulsion - the Court explained:

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"This transferred obligation was voluntarily assumed by the Respondent when joining the United Nations. There could be no question of lack of consent on the part of the Respondent as regards the transfer to this Court of the Respondent's obligations under Article 7 of the Mandate to submit to the compulsory jurisdiction of the Permanent Court."[39] Here again appears the misleading term "compulsory jurisdiction", but this time its meaning is explicit; the Court says that jurisdiction was "voluntarily" assumed and that consent was thereby given. The Court is correctly invoking the principle of consent here since it is exercising its contentious, as opposed to its advisory, jurisdiction.

As to the argument that neither Ethiopia or Liberia was "another member of the League" within Article 7 of the Mandate after the dissolution of the League and that therefore neither state had locus standi the Court's rejection of the argument may be summarised as follows:-

(1) The judicial protection of the sacred trust of civilisation was an essential feature of the Mandate System and one of the main "securities for the performance of this trust".[40] The role of the Court was the "final bulwark of protection... against possible abuse or breaches of the Mandate".[41] If this provision was unenforceable supervision by the League and its Members would be

ineffective. Under the League neither the Council nor the Assembly could sue South Africa and therefore the only judicial safeguard against abuse by South Africa was the right given to any member under Article 7 to invoke the jurisdiction of the Court in "any dispute whatever" concerning the interpretation or application of the Mandate. In this way Article 7 was a security for the trust.[42]

(2) The right given to each Member State was the most reliable method of ensuring compliance in the absence of any rights belonging to the League to appear before the Court in its own name.[43]

(3) Members of the League, including South Africa, had themselves agreed to continue their Mandates after 1946 as far as possible under their mandates. As held in the 1950 Opinion, the dossolution of the League itself did not render inoperative the Mandate System. Therefore, the South-West Africa Mandate was still in force as was Article 7 therein; consequently, those states who were Members of the League continued to have the right to invoke the jurisdiction of the Court as long as the Respondent maintained the right to administer the territory of South-West Africa under the mandate.[44]

The Court then proceeded to deal with the third Preliminary Objection raised by South Africa that there was no "dispute"

within Article 7 as no material interests of the Applicant States or their nationals were affected. The Court referred to the decision of the P.C.I.J. in the Mavromatis Case of 1924 when "dispute" was defined as "a disagreement on a point of law or fact, a conflict of legal views or interest between two persons".[45] The Court held that as the claims of the Applicants relating to the performance of obligations under the Mandate were opposed by the Mandatory, there was a dispute. The Court further observed that Article 7 was couched in very broad terms - it referred to "any dispute whatsoever" on any question "relating to the interpretation or application" of the Mandate:

"For the manifest scope, and purport of the provisions of this article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations...."[46]

The Court also dismissed the final Objection of South Africa that there was no dispute which could not be settled by negotiation. The Court found that collective negotiations between the United Nations and South Africa in the past had reached deadlock, while the pleadings and arguments of the parties to the Case before the Court also showed that there was no reasonable probability of settling the dispute by negotiation.[47]

For these reasons the Court adjudged itself competent to hear the dispute and decide on its merits.

It was not until 1966 that the second phase, i.e. judgment on the "merits" of the case, was delivered. Although it was supposed to be a judgment on the "merits" of the case, the Court surprisingly returned to what appears to be a purely jurisdictional issue and delivered a judgment to the effect that Ethiopia and Liberia had not "established any legal right or interest appertaining to them in the subject-matter of the present claims."[48] Accordingly, the Court declined to adjudicate on the claims. The reasons of the Court may be summarised as follows:

(1) The Mandatory had agreed "to exercise it (i.e. the Mandate) on behalf of the League of Nations".[49] The Court interpreted this to mean that only the League as an entity had rights against the Mandatory and that no independent rights were intended to be conferred on any other entity.[50]

(2) The Court also distinguished between what it called "conduct" provisions and "special interests" provisions in the South-West Africa Mandate. The former were viewed as defining the powers of the Mandatory and its duties to the inhabitants and to the League, while the latter were regarded as conferring rights to individual states or their nationals, as for example, the so

called "missionary clause" in Article 5 of the South-West Africa Mandate.[51] Having made this distinction the Court held that individual League Members could only sue under Article 7 of the Mandate to enforce their own "special interests" and not to enforce the "conduct" provisions of the Mandate. Thus the Applicant States could not sue in respect of the Respondent's policy of apartheid or its method of administering the mandated territory as such matters fell under the "conduct" provisions.

(3) The obligation of the Mandatory to render annual reports was specifically owed to the Council of the League and to no other entity. These reports were to be "to the satisfaction of the Council" which again emphasised that obligations were owed to the League and no other entity.[52]

(4) The rights of the League were exercised only by the League through its organs and not independently of these organs.[53]

(5) Article 7 paragraph 1 provided 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.[54]

Critical Appraisal of the Judgments of 1962 and 1966

The conclusion to be drawn from the foregoing is that the 1966 Judgment of the I.C.J. can be impugned under two heads: From the point of view of the substantive merits of the Court's arguments

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of 1966, and from the jurisdiction angle. Criticisms under the first head shall be dealt with in this Chapter, while the criticisms under the second head shall be discussed in the next Chapter.

(A) The Merits of the Court's Arguments of 1966 - General Criticisms.

To deal with the criticisms under the first head, it is submitted that even if the Court is not understood to have wrongly reverted to a jurisdictional issue in 1966, its reasoning is inconsistent with its own holdings not only in 1962 but also in the Advisory Opinions of 1950 and 1956. Its Judgment is also inconsistent with the terms of the Mandate and the founding principles of the Mandate System itself.

In the 1966 Case the Court held that its judgment of 1962 on the Preliminary Objections was not inconsistent with the 1966 one since "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits...."[55] This proposition would be valid in all instances where a clear distinction is maintained in matters concerning preliminary objections and those concerning the merits. This proposition is however inapplicable to the 1966 judgment in view of the Court's failure to distinguish between these two aspects of international adjudication.[56] This question is examined in greater detail below.

The Court in the 1966 judgment refused to attach any significance to the broad wording of Article 7 of the South-West Africa Mandate.

"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'."[57]

In so holding the Court ignored its view expressed in the 1962 case regarding the objection by South Africa that the dispute was not a dispute envisaged by Article 7. The Court rejected the latter argument in 1962 as follows: "The Respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate which mentions 'any dispute whatever' arising between the Mandatory and another Member of the League of Nations 'relating to the interpretation or the application of the provisions of the Mandate'. The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to one particular provision or provisions, but to the 'provisions' of the Mandate, obviously meaning all or any

provision, whether they relate to substantive obligations of the Mandatory towards the inhabitants of the territory or towards the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself." The Court concludes significantly, "for the manifest scope and purport of the provisions of this Article (Article 7) indicates that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both towards the inhabitants of the Mandated Territory, and towards the League of Nations and its Members." Immediately thereafter the Court adds: "Nor can it be said, as argued by the Respondent, that any broad interpretation of the compulsory jurisdiction in question would be incompatible with Article 22 of the Covenant...."[58]

This indicates clearly a preference by the Court to give a liberal interpretation to Article 7 in view of the sweeping nature of the terminology used therein. Yet in 1966 the Court held that the wide nature of the terminology of Article 7 was not of any significance.

Also apparently forgotten in 1966 was the Court's view of 1962 regarding its own role as a "security" for the performance of the sacred trust. The Court had described itself as the "final bulwark of protection... against possible abuse or breaches of the

Mandate."[59]

The 1966 Judgment may also be criticised as having been unduly influenced by the unanimity rule of Article 4 paragraph 5 of the Covenant. Under this provision it has been argued that the Council could not impose any decision on the Mandatory without its consent and approval; that the Council was the sole body authorised to make representations to the Mandatory concerned, and that for this reason no other body - not even the Permanent Court - could bind the Mandatory by any decision concerning the Mandate. This argument is analysed in detail below.[60]

In contrast to this the Court in the 1962 Judgment, after observing that the judicial protection of the trust was an essential feature of the Mandate System and served as the "final bulwark of protection... against possible abuse or breaches of the Mandate" added, "besides the essentiality of judicial protection for the sacred trust and for the rights of the Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision."[61]

Falk has written that the aforesaid construction of the Mandate System "is clearly repudiated by the Court in 1966; the requirement of unanimity in League voting is relied upon in the latter decision to demonstrate the intention to avoid the judicial creation of legal obligations binding on the Mandatory whereas in 1962 this same voting requirement was... invoked to establish the necessity for vesting judicial protection in the Members of the League."[62]

Justice Hidayatullah has developed an interesting argument to the effect that the dissenting opinions in the Mavromatis Case,[63] particularly Lord Finlay's influenced the dissenting opinions in 1962 and the judgment of the majority in 1966.[64]

Lord Finlay had laid down three conditions for the exercise of the compulsory jurisdiction of the P.C.I.J.: (1) the dispute should be between the Mandatory and another Member of the League; (2) it should be one which could not be settled by negotiation; (3) it should relate to the interpretation or application of the provisions of the Mandate.

Justice Hidayatullah submits that these three conditions form the nucleus of the 1966 judgment. In his opinion the first condition was adopted by the Court in 1966 by accepting the argument of South Africa that the Applicant States had no dispute on their own account and that they were not any longer Members of the League. Acceptance

by the Court of this argument is, in Hidayatullah's opinion, shown by the Court's holding that these states had to show an injury to their own or their nationals' interests - hence the distinction between the "conduct" provisions and "special interests" provisions of the South-West Africa Mandate. Lord Finlay had also argued that there must be a dispute between the Parties before the Raquete was filed. Justice Hidayatullah observes that the Court in 1966 noted the fact that before the Raquete was filed the Applicants had not made any demands upon South Africa, which if refused by South Africa would have given rise to a dispute.[65] He further asserts that Lord Finlay's emphasis on consent[66] as the basis of the Permanent Court's jurisdiction also influenced the 1966 judgment in that the Court was prepared to find that the Applicants would have a legal interest only if they claimed under the missionary clause (a "special interests" clause). The implication is that the Mandatory had, according to the Court, consented to individual League members' rights to invoke the jurisdiction of the P.C.I.J. only if their special interests were affected.[67]

Justice Hidayatullah concludes: "....(T)he unanimous opinion of the Court expressed in the Advisory Opinion of 1950 and the majority judgment of the Court of 1962 were reversed by relying on the dissenting opinions in the Mavromatis Case for inspiration. All the time the main issue has been avoided, which is whether

South Africa is going against the Mandate and its obligations, and whether the Applicants who had proved themselves to be other Members of the League could not ask for the interpretation and application of the Mandate by the Court in relation to the facts established. Is it, therefore, surprising that there should be criticism all over the world?"[68]

Judge Wellington Koo, who dissented with the decision of the Majority of the Court in 1966, pointed out the inconsistency of that decision with the 1950 Opinion, [69] when the Court had emphasised simultaneously "the essentially international character of the functions which had been entrusted to the Union of South Africa" and the fact that the Mandate, under which every Member of the League could submit to the P.C.I.J. any dispute relating to the interpretation or application of the provisions of the Mandate, undoubtedly implied the existence of a legal right or interest of the League Members in the performance of the Mandate.[70]

This question is now discussed.

(B) <u>Locus Standi Within the Context of the Merits of the 1966 Judgment</u>.

It would appear that the wording of Article 7 paragraph 2 grants every Member State of the League the right to seek even purely

declaratory judgments interpreting certain provisions of the Mandate.[71] The judgment interpreting the Mandate need not necessarily be one relating to its application as well. The words are disputes "relating to the interpretation or the application of the provisions of the Mandate...." Once a right to seek a declaratory judgment exists there is no necessity for any further showing of interest;[72] that is, this right provides the locus standi to move the Court to decide on the merits of any such question.[73]

In any case, in the discussion of the concept of trust in Chapter II it was submitted that each Mandatory held a dual mandate or "double trust" - (a) on behalf of the inhabitants of the mandated territory; and (b) on behalf of the international community. It was also submitted that the members of the League were in view of this rightly given the power to invoke the jurisdiction of the P.C.I.J. for the prevention of breaches of the trust or, what in fact is the same thing, for the enforcement of the trust.[74] These arguments will not be repeated here; suffice it to say that the enforcement of a trust institution displaces the traditional dogma of "no right without a subject". This together with the fact that the trust is also held on behalf of the international society, it is submitted, gave every member of the League a genuine locus standi to invoke the jurisdiction of the P.C.I.J.

It was also submitted above that the Mandates were special inter-

national agreements under which all members of the League had acquired the rights corresponding to those obligations undertaken by the Mandatories.[75] This is further confirmation of the locus standi of each League Member.

The Court, in its 1962 Judgment, gave at least three fairly lengthy reasons for its rejection of the second Preliminary Objection of South Africa that neither of the Applicants was *"another Member of the League" for it to have locus standi to* bring the action. The rejection of this argument by the Court clearly showed that it considered the applicants to have a locus standi. If so, this question was res judicata under sections 59 and 60 of the Statute of the Court.

Indeed the whole judgment of 1962 is not only binding between the parties,[76] but it is also final on the questions dealt with therein.[77] Being thus final, it binds the Court as well unless revised by it under the procedure prescribed by Article 61 and Article 78 of the Rules of the Court.[78]

Also res judicata is the question raised by South Africa in 1962 that there was no "dispute" within Article 7 of the Mandate as no material interests of the Applicants or their nationals were affected. The Court's rejection of this argument implies that a dispute under Article 7 of the South-West Africa Mandate need not always include a material interest.

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trouble and expense to explore all the details of the merits,
and only thereafter to be told that the Court would pay no heed
to all their arguments and evidence because the case was dis-
missed on a preliminary ground which precluded any investiga-
tion of the merits?"[79]

In the light of the foregoing it is submitted that the Applicants (Ethiopia and Liberia) were entitled to judgment on the merits subject to their producing adequate proof to substantiate their allegations against South Africa.

A finding of locus standi on a preliminary issue makes it impossible to render a finding of an absence of legal interest at the stage of hearing of the merits of the issue.

To quote Judge Jessup: "The (1966) Judgment of the Court rests upon the assertion that even though - as the Court decided in 1962 - the Applicants had locus standi to institute the actions in this case, this does not mean that they have the legal interest which entitles them to a judgment on the merits. No authority is produced in support of this assertion which suggests a procedure of utter futility. Why should any state institute any proceeding if it lacked standing to have judgment rendered in its favour if it succeeded in establishing its legal or factual contentions on the merits? Why would the Court tolerate a situation in which the parties would be put to great trouble and expense to explore all the details of the merits, and only thereafter to be told that the Court would pay no heed to all their arguments and evidence because the case was dismissed on a preliminary ground which precluded any investigation of the merits?"[79]

Judges Wellington Koo, Koretsky and Mbanefo also criticised, in their respective dissenting opinions, the distinction between the Applicants' interest and the question of the Court's jurisdiction as being without any legal foundation.[80] If this is so then "it would have to be conceded that the question of Applicants' interest was disposed of by the Court in 1962 at the time of dismissing the third Preliminary Objection."[81]

The conclusions of the Asian-African Legal Consultative Committee on this subject aptly summarise the position so far:

"It is doubtful whether it is legally sound to treat the question of Applicants' interest as a matter appertaining to merits, in view of the facts (1) that the Court in 1962, considered the question as a jurisdictional question while examining and dismissing the third preliminary question; (2) that in 1962 the Court did not join the issue to the merits of the case; and (3) that neither of the parties raised the question of Applicants' interest in their final submissions during the second (or merits) phase of the proceedings."[82] In other words, if the Applicants' legal interest was not a question appertaining to the merits of the case then the 1966 judgment, which purported to treat it as such (despite its treatment of the matter in 1962) amounts to a reconsideration of the 1962 judgment. Such a reconsideration would have been possible under Article 61 of the Statute of the I.C.J. but only if new facts were considered.

Article 61 of the Statute provides in part:

(1) "An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which in fact was, when the judgment was given, unknown to the Court and also to the party claiming revision...."

However, no new facts were discovered in 1966; neither had the Respondent requested such revision of the 1962 judgment. In view of this the 1962 judgment was and remains final and binding on the parties in accordance with the classic statement of Judge Anzilotti that there is res judicata if there is identity of parties, identity of cause and identity of object in two proceedings.[83]

It is possible to approach the issue of legal interest from another angle, namely, by enquiry as to whether a legal interest belonging to the Members of the League existed by virtue of an additional source external to the Mandate. It is possible to render an affirmative answer if the Covenant is regarded as another source in addition to the Mandate establishing a legal interest in Members. Under Article 11 of the Covenant, it was "declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any

circumstance whatever affecting international peace or the good understanding between nations upon which peace depends". Any League Member had therefore a right to seise the Assembly or the Council of the League of any breach of any Mandate if such breach could or did affect "international peace" or "good understanding between nations". The question of the existence of the breach - quite apart from whether or not such breach adversely affects international peace or good understanding between states - is a question of interpretation of the Mandate since only then is it possible to decide whether the Mandate has been breached. If however, that state was unable to decide the question one way or the other or encountered difficulties which cast doubt on its interpretation, that state could arguably be said to have possessed a legal interest, cognisable under the adjudication clause of the Mandate in question, in seeking an authoritative interpretation by the Permanent Court so that the state concerned could decide whether or not it should exercise its right under Article 11 of the Covenant. The State would have had a legal interest not only under the Covenant (i.e. by reason of its right under the Covenant to move the Assembly or the Council) but also under the Mandate vis-a-vis the Mandatory (i.e. by reason of the dispute with the Mandatory relating to the interpretation and application of the Mandate). This inter-relation of the function of the Permanent Court and the political organs of the League would lay a more solid foundation for legal interest, especially if the state and the

Mandatory were both parties to the Covenant.

The dissolution of the League and the creation of the United Nations would of course leave unaffected this legal interest in view of Article 80 paragraph 1 of the Charter of the United Nations maintaining the rights of states and people and the terms of existing international instruments, and also in view of the well-established principle of the survival of the raison d'être of the Mandates even after the dissolution of the League together with all the rights and obligations of the Mandatories.

It may be said that the Charter itself preserved this legal interest so that the transition from the pre-war international legal order to the modern post-war order had no effect on it. This is because the Charter contains provisions similar to Article 11 of the Covenant. Under Article 35 (1) Members now have a comparable right to notify the General Assembly or the Security Council of any dispute or any situation which might lead to "international friction". Thus an alleged breach by South Africa of its Mandate (e.g. its policy of apartheid being a contravention of the Mandate as alleged by the Applicant States in the 1962 Case) could easily lead to "international friction" in the future as it has done in the past. Therefore, it may be argued, that at least former League Members such as Ethiopia and Liberia, if not all members of the United Nations, had a legal interest in 1962 and continue to have it to the present day to move the International

Court of Justice.

This however does not mean that if a State has the right to seise the General Assembly of any particular matter that state also automatically possesses the right to seise the I.C.J of the same matter. The juridical bases for the right of a State to seise the General Assembly and the right to seise the I.C.J. are different. The former is based on Article 35 of the Charter, while the latter right - for example, in the apartheid question mentioned above - arises because (1) the I.C.J. has to decide a question concerning the interpretation or the application of the Mandate (since whether or not the policy of apartheid is a breach of Mandate can only arise as a question involving the interpretation or the application of the Mandate). Once a breach is thus judicially determined to exist it then becomes a fit question to be submitted to the General Assembly under Article 35 of the Charter in order for it to decide whether the breach will cause international friction, which is a political question; (2) the Mandate is an international treaty (as submitted in Chapter VI above); (3) the Mandate is still "a treaty or convention in force" within Article 37 of the Statute of the I.C.J. giving the latter jurisdiction to hear the matter since Article 7 of the Mandate, the jurisdiction clause of the P.C.I.J., has been preserved by Article 80 paragraph 1 of the Charter of the United Nations.

It can be seen therefore that the right to submit a question to the General Assembly is not the same as the right to submit a question to the I.C.J. The question submitted to the former is a political question while the question submitted to the latter is a legal question concerning the interpretation or application of a legal document, which can only be submitted under the above conditions. It is possible that a State may by-pass the I.C.J. and validly seise the General Assembly of the question of apartheid as a cause of international friction within Article 35, but this would still be a political and not a legal question. If this happens the question of the status of the Mandate as an international treaty and as to whether it is "in force" becomes irrelevant. The General Assembly would by reason of the state acting under Article 35 ipso facto acquire jurisdiction to decide the question. It must further be noted that the question which the General Assembly would be competent to decide is not whether the policy of apartheid constitutes a breach of Mandate but whether it is likely to lead to international friction. The appropriate organ to decide the former question is, it is submitted, the I.C.J.

The tenor of the judgment of the Court in 1966 suggests that if the Applicant States had showed that their material interests or interests of their nationals were affected as, for example under the so called "missionary clause" in Article 5 of the South-West

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The tenor of the judgment of the Court in 1966 suggests that if the Applicant States had showed that their material interests or interests of their nationals were affected as, for example under the so called "missionary clause" in Article 5 of the South-West

Africa Mandate, the Applicant States would have succeeded in establishing a sufficient legal interest for the Court to pass judgment on the merits. The Applicants did not base their claim under Article 5, but they did allege a breach of Article 2 of the Mandate by referring to the policy of apartheid practised by South Africa inside the territory of South-West Africa. The Court apparently drew a distinction between Article 5 and Article 2 by showing a willingness to adjudicate under the former article but not the latter. This in Judge Jessup's opinion is an "entirely artificial" distinction and one that is "not supported by the history of the drafting".[84] The Judge further comments:

"Because Applicants did not specifically invoke Article 5 in their Applications, the Judgment denies them the right to obtain a finding whether the Mandate - on which any such right would rest - still subsists. Applicants do base their ninth submission on Article 7(1) which provides that the terms of the Mandate may not be changed without the consent of the Council of the League; the Judgment denies them the right to know whether even their admitted rights under Article 5 could be terminated by the unilateral act of the Mandatory although it is said that 'there is no need to enquire' whether the consent of the Member would have been necessary.... Looking at the history of the drafting of the Mandate with the intimate connection between the two paragraphs of Article 7, it again seems highly artificial to take a position as follows: the decision of the Court in 1962 that paragraph 2 of

Article 7 survives... is accepted, but this surviving right of resort to the Court does not entitle Applicants to learn from the Court whether paragraph 1 of Article 7 is still in force, although if it is not, the Mandatory might also terminate the second paragraph of Article 7 and deny to Applicants even what are - under the Judgment of the Court - the meagre rights to file their applications and learn that the Court has jurisdiction." But the same Judge poses the question: "Jurisdiction to what?" and caustically suggests the answer: "Jurisdiction according to the Judgment, to say that the Court cannot give effect to the claims because Applicants lack a legal right or interest..."[85]

The Court while making the above distinction between "conduct" provisions and "special interests", found that the "open door" provisions (guaranteeing League Members equal economic opportunity) had a double aspect in that they fell under both categories. This shows that the mandate provisions were not susceptible of classification under such neat categories.

Judge Mbanefo pointed out that the compromissory clause, as embodied in Article 7 paragraph 2 of the Mandate, did not permit such a distinction: "To do so... is to do violence to the actual words of the text and is in the circumstances impermissible."[86] He also described the distinction "as a matter of treaty interpretation, to be illusory."[87]

Judge Nervo was of the view that the distinction and "the meaning and function given to it does not follow from the letter or the spirit of the Mandate."[88]

The Court in its 1966 Judgment had pointed out that all questions concerning mandates were solved in the Council and that this body had never sought an advisory opinion from the Court, and that only one case, relating to the Mavromatis Concessions, was referred to the P.C.I.J. by an individual League Member and that too concerning an interest which fell within the category of "speical interests".[89] The implication was clearly that this supported the Court's claim that a League Member could sue only if its material interests were affected. This is a truly surprising test, firstly because the absence of a prior suit cannot surely operate as a bar to proceedings being initiated at a later stage, and as Judge Wellington Koo, dissenting, stated, this "(did) not necessarily prove that the individual League Members had no legal right or interest" in the observance of the provisions of the Mandate.[90] Secondly, it was submitted in the discussions on the Mavromatis judgments that there are dicta in these cases which suggest that the right of League Members to sue Mandatories was not restricted only to instances involving their material (i.e. "special") interests.[91] The fact that the Mavromatis Case involved a material interest may therefore be regarded as purely coincidental.

Finally, it is submitted that the classic concept of individual

interest is not applicable to the South-West Africa Mandate because of the humanitarian purpose of the document. International law permits actions in certain circumstances which show that legal interest is not identical to a strictly individual interest. This is particularly so with regard to treaties of a humanitarian character whose aims are for the welfare of humanity in general and not for just one or two individual parties. For example, in the Advisory Opinion on the Convention on the Prevention and Punishment of the Crime of Genocide the I.C.J. held:

"In such a Convention the contracting states do not have any interest of their own; they merely have, one and all a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states...."[92]

Jenks has expressed a similar view: "....(E)very party to a treaty has at least a potential legal interest in any breach of its provisions, and any breach of a rule of international law... prejudices, at least potentially, the rights of all other subjects of international law or... of all subjects of the law who may be affected by it. Remoteness of interest may limit any reparation due but is unlikely to destroy the legal interest which is the source of liability for, as the Mavromatis Palestine Concessions

(Merits) Case shows, the existence of a legal interest does not, in international law, depend on the actual suffrance of damage..."[93]

Rosenne has stated that international law recognises the right of a state to bring an action for the protection of a common interest recognised by international law without proof that material interests of a concrete character have been affected.[94] Wright on the other hand states that the conclusion that Members of the League had "rights corresponding to all of the duties imposed upon the mandatories by the Covenant and the mandates" was justified "not only by the traditional view with respect to treaties for the protection of natives and minorities but by the theory back of such treaties as well as Article 22 that all the contracting states have a real interest in the protection of backward peoples and minorities."[95] The same author adds however that "while the interest of the League Members in some of the Mandate guarantees, such as those prohibiting forced labour, slavery, and disregard of native land titles is mainly of a humanitarian character, their interest in others, such as those requiring religious toleration and demilitarisation, may be definitely related to their own missionaries or their own national defence."[96]

For these reasons and because of the highly altruistic purpose of the Mandates showing that all the members of the League had a common interest in their fulfilment, it is inappropriate to measure legal interest in terms of the narrow concept of individual

interest.

(C) The Compromissory Clause in the Tanganyika Mandate

At this juncture one paragraph in the Mandate for Tanganyika deserves notice. This paragraph provided in part that "states members of the League of Nations, may...bring... any claims on behalf of their nationals for infraction of their rights under the Mandate before the Court for decision."[97] This paragraph was unique to the Tanganyika Mandate in the sense that it did not appear in any other Mandate. This, it may be argued, indicated firstly that the Members of the League could invoke the jurisdiction of the P.C.I.J. by espousing the claims of their nationals only if the Mandate concerned had a clause such as that which appeared in the Mandate for Tanganyika, and secondly that if the Mandate did not contain such a clause this rendered the Court impotent to exercise jurisdiction over cases under that Mandate in which a member of the League claimed on behalf of its nationals.

This argument is, of course, to be kept distinct from the following two arguments which have been discussed above; the first one bing that League Members, could only sue if their material (or "special") interests or those of their nationals were affected, and the second argument that League Members could sue regardless of any

material injury. In view of the Tanganyika Mandate, therefore, the general argument would be that a League Member could claim on behalf of its nationals for material injury suffered by them only if the Mandate in question contained a clause such as that in the Tanganyika Mandate; thus the above statement that League Members could sue only if their material (or "special") interests or of their nationals were affected must be qualified in so far as League Members could, in view of the rule deduced from the Tanganyika Mandate, claim on behalf of their nationals only if the Mandate concerned contained a compromissory clause similar to that in the Tanganyika Mandate. The operation of such a clause would however be restricted only to those situations when a League Member claimed on behalf of a national, and it would not necessarily prejudice the argument that every League Member had a sufficient legal interest in each Mandate as to enable it to seek even a declaratory judgment from the P.C.I.J. in respect of any Mandate notwithstanding that it did not contain such a clause.

As for the right of a state in international law to sue another state on behalf of its own nationals it may be argued with much justification that such a right enjoys an independent existence and does not depend on express clauses in treaties conferring on states such a right. Thus the non-existence of a Tanganyika Mandate - type compromissory clause in other Mandates does not affect the right of states to sue under these Mandates for injury done to their nationals.

On the other hand the effect of the jurisdictional clause in the Mandate for East Africa may be construed as negating the right of states to seek declaratory judgments per se without proof of material injury. The clause refers to "infraction of rights" which may be construed as referring to material interests. Although this interpretation is not acceptable as suggested above, if it must prevail, its effect must be restricted only to the Tanganyika Mandate and not to all Mandates generally.

In the Mavromatis Case five Judges dissented with the P.C.I.J.'s preliminary decision on jurisdiction, among them Judges Moore, De Bustamante and Oda. These three Judges directed attention to the absence in the Mandate for Palestine of the additional paragraph found in the Tanganyika Mandate. Judge Moore drew no conclusion from this but Judges De Bustamante and Oda thought that this indicated that the Court had no compulsory jurisdiction over cases under the Palestine Mandate in which a Member of the League claimed on behalf of its national.[98]

However the Court's judgment in this case suggested that the paragraph in the Tanganyika Mandate added nothing to the article found in all mandates providing for submission of "any dispute whatever" with the Mandatory by another member of the League "relating to the interpretation or the application of the provisions of the Mandate" which negotiations failed to settle. On the principle that a state has a right to just treatment of its nationals abroad, the article

was found broad enough to cover claims presented by a member of the League on behalf of its nationals.[99] This would indicate that the compromissory clause in the Tanganyika Mandate was redundant. This view was confirmed as far back as in 1924 by Mr. Rappard, the Director of the Mandate Section of the League Secretariat, who affirmed that he had "every reason to believe that this difference is entirely due to an accident in the drafting of the Tanganyika Mandate."[01] Even the I.C.J. in its 1966 Judgment on South-West Africa dismissed the clause as "a drafting caprice".[02]

In view of this and if, as submitted above, Members of the League were to have a right to ensure that the indigenous inhabitants of mandated territories were treated as prescribed by the terms of their mandates, the usual compromissory clause found in the rest of the Mandates would seem broad enough to cover claims presented by League Members on behalf of these inhabitants.

Even the two judges who alone dissented with the 1950 Opinion on the question of the transfer of the powers of supervision of the League to the United Nations' General Assembly acknowledged that members of the League possessed a legal interest in the observance of the obligations of the Mandatory. Judge McNair stated:

"Although there is no longer any League to supervise the existence of the Mandate, it would be an error to think that there is no

control over the Mandatory. Every state which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate. The Mandate provides two kinds of machinery for its supervision - judicial, by means of the right of any Member of the League under Article 7 to bring the Mandatory compulsorily before the Permanent Court, and administrative, by means of annual reports and their examination by the Permanent Mandates Commission of the League."[03]

Judge Read in his Separate Opinion in the 1950 case pointed out that after the dissolution of the League the position was (1) that the Mandate survived as did all the obligations of the Mandatory, and (2) that "the legal rights and interests of the Members of the League, in respect of the Mandate, survived...."[04]

Judge Read divided the obligations of the Mandatory into three classes; namely, those designed to protect the well-being of the inhabitants within the Mandate territory, those obligations owed to Members of the League, e.g. in respect of missionaries and nationals, and lastly, those relating to the supervision and enforcement of the first and second, e.g., the compulsory jurisdiction of the Permanent Court under Article 7 of the South-West Africa Mandate and the system of reports, accountability, supervision and modification under Article 6 and Article 7 paragraph 1 of the Mandate and Article 22 paragraphs 7, 8 and 9 of the Covenant. In Judge Read's opinion all these obligations had one

point in common: "Each Member of the League had a legal interest, vis-a-vis the Mandatory Power, in matters relating to the 'interpretation or application of the provisions of the Mandate', and had a legal right to assert its interest against the Union by invoking the compulsory jurisdiction of the Permanent Court."[05] A little later the same Judge adds: "....(T)he same reasons which justify the conclusion that the Mandate and the obligations of the Union were not brought to an end by the dissolution of the League, lead inevitably to the conclusion that the legal rights and interests of the Members, under the Mandate, survived. If the obligations of the Union, one of the 'Mandatories on behalf of the League' continued, the legal rights and interests of the Members of the League must, by parity of reasoning, have been maintained."[06]

In conclusion, it is submitted that the locus standi of the community of states in the discharge of Mandates must be viewed within the overall context of the aims and purposes of the Mandate System - the avoidance of outright annexation and the administration of non-self-governing peoples by the Powers subject to certain conditions and with a view to granting full self-government to these peoples as soon as they acquired the necessary administrative experience.

Haas has observed that: "If the Mandate System did not serve as an inter-imperialist compromise, it functioned as a most useful

principle for reconciling the clashing aspirations of various units of the British Empire. British statesmen sorely needed a formula which would meet the demands for outright annexation put forward by Australia, New Zealand and South Africa and the opposing demand that the Empire refrain from further expansion. The answer, of course, was found in that ingenious device called the 'C' Mandate."[07]

In this way the idea of Mandate was a negation of the idea of annexation and created the international trust of civilisation in the discharge of which each signatory state of the Covenant of the League had a legal interest.

(D) The Purpose of the Mandate System and the 1966 Judgment

It is submitted that it is impossible to separate the raison d'être and original object of the Mandate System on the one hand and the method for implementing the system on the other.

The objectives of the System have been described in detail[08] and will not be repeated here. It suffices to emphasise that the Mandate System was arrived at as a compromise between the various conflicting views regarding the future of dependent territories conquered from the defeated Powers in the First World War. Apart from negating the idea of annexation the Mandate System created guarantees against future annexation and, simultaneously, for the proper execution of the sacred trust. One such guarantee was the

right of any Member of the League to arraign a Mandatory before the P.C.I.J. on any question relating to the interpretation or application of the provisions of the Mandates.

It has never been challenged that the original objectives of the Mandate System survived the dissolution of the League.[09] If this is so, and so long as these objectives remain unfulfilled, all the attendant multiple guarantees for the implementation of these objectives must also be deemed to have survived mutatis mutandis.

The Mandatory of South-West Africa had itself declared in the Assembly of the League that the dissolution of the League would leave its obligations under the Mandate unchanged: "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory."[10]

The I.C.J.'s Opinions of 1955[11] and 1956[12] also proceeded on the premise, first articulated in the 1950 Opinion, that the necessity for the supervision of Mandates continued to exist despite the disappearance of the original supervisory organ. Of the 1955 and 1956 Opinions, the latter is of greater relevance to the purpose of Mandates. Only this Opinion is examined here, the former Opinion is discussed below in a different and more appropriate context.[13]

In 1956 the Court was requested by the General Assembly of the United Nations to give an opinion on the question of the admissibility of hearings of petitioners by the Committee on South-West Africa set up by the General Assembly in 1953.[14] This Committee was constituted after the Assembly had accepted the Court's opinion of 1950, and its functions were, as the Court observed in 1956, analogous to those of the Permanent Mandates Commission.[15] The Court was required to pronounce as to whether or not the granting of oral hearings by the Committee would be inconsistent with the 1950 Opinion, the operative part of which stated that South Africa continued to have international obligations stated in Article 22 of the Covenant and the Mandate for South-West Africa as well as the obligations to transmit petitions from the inhabitants of that territory and that annual reports and petitions should be sent to the United Nations.

In giving the Opinion the Court observed that "the Court must have regard to the whole of its previous Opinion (of 1950) and its general purport and meaning."[16] It also emphasised the need for supervision to achieve the original purpose of the Mandate,[17] and that the "paramount purpose" of the General Assembly taking over the supervisory function was to safeguard the sacred trust of civilisation.[18] In doing so the General Assembly's supervision should not exceed the degree of supervision of the League.

It was contended that the hearing by the Committee would exceed the degree of supervision of the League Council. The Court rejected this contention holding that such hearings would place the Assembly in a better position to judge the merits of petitions and this could not increase its degree of supervision.[19] The Court also held that the fact that oral hearings had not previously taken place in the Council of the League was immaterial to the exercise of this power by the General Assembly. It also noted that this procedure was necessitated by "practical considerations arising out of lack of co-operation by the Mandatory" affecting the ability of the General Assembly to exercise effective supervision.[20] Judge Lauterpacht in his dissenting opinion held the same.[21]

In view of the foregoing the Court declared that the hearings would not be inconsistent with the 1950 Opinion in so far as they were "necessary for the maintenance of effective international supervision of the administration of the Mandated Territory."[22]

The Court cannot be understood to be upholding supervision for its own sake. It was referring to supervision <u>with a view to attaining the original purpose of the Mandate</u> as explained by the 1950 Opinion. The 1950 Opinion was also endorsed by the Court in its 1966 judgment.

In view of the jurisprudential history of the Court itself on the

question of the overriding importance of the purpose of the Mandate for South-West Africa the authority of the 1966 Judgment remains a matter of grave doubt.

It was stated above that the 1966 Judgment of the I.C.J. can be criticised from two standpoints, namely, from the point of view of the substantive merits of the Court's arguments and from the jurisdictional angle. Criticism under the first head have been discussed above and included a demonstration of how the 1966 judgment is inconsistent with the 1962 and 1956 judgments, the terms of the Mandate for South-West Africa and the basic principles of the Mandate System. These criticisms do not however affect certain legal consequences which follow from the nature of the Mandate system and the Mandatory's unwillingness to place the territory of South-West Africa under United Nations' supervision. The consequences are those relating to the status of the Mandate, the authority of the Mandatory and the Powers of the United Nations. These were adequately summarised by the Ethiopian delegate at the General Assembly in 1966:

(1) That the mandate remained in force notwithstanding the dissolution of the League.[23]

(2) That there had never been any cession of territory or transfer of sovereignty to South Africa.

(3) That South Africa does not have the competence to alter the status of the Territory without the consent of the United Nations.

(4) That the General Assembly had succeeded to the supervisory functions of the Council of the League.

(5) That South Africa is under an obligation to submit to the jurisdiction of the I.C.J.

(6) That the rule adopted by the General Assembly providing for a two-thirds majority rule in its voting procedure in questions concerning the mandate is valid notwithstanding the unanimity rule in the League.[24]

(7) That the authorisation by the General Assembly of oral hearings of petitions on South-West Africa is valid.

(8) That the administration of this territory as an integral portion of the Republic under Article 2 of the Mandate must at all times have been subject to and be considered with the basic purpose of the Mandate.[25]

It is now proposed to discuss the 1966 case from the jurisdictional angle. This is done within the overall context of a comparative study of the jurisdictional aspects of all the South-West Africa Cases discussed so far, particularly the Advisory Opinions of 1950 and 1971 and the judgments of 1962 and 1966.