DISSENTING OPINION OF JUDGE FORSTER

[Translation]

However learned the reasoning of the majority Judgment, declaring the claim of Liberia and Ethiopia to be inadmissible and consequently rejecting it, I am unable to subscribe to it.

In my view, the very essence of the Mandate for South West Africa demands that the Court should examine the complaints against the Mandatory, namely the Republic of South Africa, and then declare whether they are justified or not.

The sacred trust laid by the League of Nations on the Union of South Africa is defined in the second paragraph of Article 2 of the Mandate for German South West Africa, of 17 December 1920, which provides:

> "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."

When it was requested to give its view on the international status of South West Africa, the International Court of Justice, on 11 July 1950, gave the following Opinion:

> "that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920;
> that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;
> that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System;
> that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System;
> "that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the inter-

national status of the Territory rests with the Union of South Africa acting with the consent of the United Nations."

There were two further Advisory Opinions of this Court, relating to the Mandate for South West Africa, given on 7 June 1955 and 1 June 1956 concerning the voting procedure and hearings of petitioners.

On 4 November 1960 the Registrar of the International Court of Justice received two Applications, each instituting proceedings against the Government of the Union of South Africa relating to "the continued existence of the Mandate for South West Africa and the duties and performance of the Union, as Mandatory, thereunder". One of these Applications was submitted on behalf of the Government of Ethiopia, and the other on behalf of the Government of Liberia.

To found the jurisdiction of the Court in the proceedings thus instituted, the Applications, having regard to Article 80, paragraph 1, of the Charter of the United Nations, relied on Article 7 of the Mandate of 17 December 1920 for German South West Africa and Article 37 of the Statute of the International Court of Justice.

The Applications of Ethiopia and Liberia asked the Court to adjudge and declare that:

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

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

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

D. The Union has substantially modified the terms of the Mandate without the consent of the United Nations; that such modification is a violation of Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary

prerequisite and condition to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

E. The Union has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; its failure to do so is a violation of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to take all practicable action to fulfil its duties under such Articles.

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

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

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

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

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

duty forthwith to render such annual reports to the General Assembly.

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

The Union of South Africa replied by raising preliminary objections:

"For all or any one or more of the reasons set out in its written and oral statements, the Government of the Republic of South Africa submits that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings, and that the Court has no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the Applications and Memorials, more particularly because:

Firstly, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is no longer a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this submission being advanced—

(a) with respect to the said Mandate Agreement as a whole, including Article 7 thereof, and

(b) in any event, with respect to Article 7 itself;

Secondly, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa;

Thirdly, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;

Fourthly, the alleged conflict or disagreement is as regards its state of development not a 'dispute' which 'cannot be settled by negotiation' within the meaning of Article 7 of the Mandate for South West Africa."

In its Judgment of 21 December 1962 the Court dismissed all four of these preliminary objections and found as follows:

"The Court concludes that Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation. Con-

sequently the Court is competent to hear the dispute on the merits.

For these reasons, the Court, by eight votes to seven, finds that it has jurisdiction to adjudicate upon the merits of the dispute."

Thereafter the second phase of the case was opened and the proceedings on the merits resumed. During these proceedings the facts were abundantly canvassed, the law keenly debated, and witnesses and experts examined and cross-examined, all of which took many long months.

And now today this same Court, which gave the three above-mentioned Advisory Opinions in 1950, 1955 and 1956 and which in 1962 delivered a judgment upholding its jurisdiction to adjudicate upon the merits of the dispute, this Court now declares the claim to be inadmissible and rejects it on the ground that Ethiopia and Liberia have no legal interest in the action.

This passes my understanding.

It is not that I turn a blind eye on the old maxim "no interest, no action", but I find it difficult to believe that in proceedings concerning the interpretation and application of an international mandate based on the altruistic outlook of the time, legal interest can be straight-jacketed into the narrow classical concept of the individual legal interest of the applicant State.

The requirement that there should be an individual interest is no doubt the rule, but every rule has its exceptions. In international law there exists a form of legal interest which may, in certain circumstances, be quite separate from the strictly individual interest of the applicant State. I find evidence of this, for example, in the Convention on the Prevention and Punishment of the Crime of Genocide. In its Advisory Opinion of 28 May 1951, the Court held as follows:

> "In such a convention the contracting States do not have any interests 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, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."

The concept of a legal interest separate from the individual interest of the applicant State is thus not unknown in international law. It can even be clearly seen in certain international treaties for the protection of minorities concluded after the Great War of 1914-1918. It there takes the form of a compulsory jurisdiction clause which confers the status of international dispute on any difference of opinion in regard to questions of law or of fact concerning the application of the treaty between the minority State and any Power which was a member of the Council of the League of Nations. It was not required that the Power which was a

member of the Council of the League of Nations should be a contracting party to the minorities treaty, nor was it required it should have an individual legal interest. It was sufficient for it to apply to the Court in the general interest of a correct application of the régime.

In my view the circumstances are similar in this case. It was in the interest of the Native inhabitants that the Mandate for German South West Africa was instituted, and its essential provisions have no other purpose than "to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory". The Mandate was not concluded in the interests of the State Members of the League of nations or in that of the League itself. It was concluded in the interest of Native peoples not yet capable of governing themselves. It was a "sacred trust" conferred and accepted without any corresponding advantage for either the Mandator or the Mandatory. The circumstances were those of complete altruism. However, the beneficiaries of the generous provisions of the Mandate, namely the Natives of South West Africa, have no capacity to seise the International Court of Justice as they do not yet constitute a sovereign State. Nor do they enjoy the nationality of a State capable of seising the Court for the protection of its nationals. This being so, what is the compelling rule which prevents the Court, in examining the admissibility of the claim, also taking into account, as in the field of international protection of minorities, the principle of the general interest in a correct application of the mandate régime? Ethiopia and Liberia were Members of the League of Nations, and can it not be said that here the legal interest consists of the interest possessed by any Member in securing observance of a convention prepared in a League in which it participated? While it is true that the Mandate for South West Africa does not contain terms which are absolutely indentical with those in the compulsory jurisdiction clause in the treaties for the international protection of minorities to which I have referred, there is at least the following provision in the second paragraph of Article 7:

> "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 (*sc.* the International Court of Justice) provided for by Article 14 of the Covenant of the League of Nations."

Contrary to the view taken by the majority, I personally am convinced that this provision made it possible for the Court to declare admissible the claims of Ethiopia and Liberia which, having been Members of the League of Nations, retain a legal interest in securing observance by the Mandatory of its undertakings so long as its presence in South West Africa continues. I find it hard to believe, as is held by the majority, that the second paragraph of Article 7 of the Mandate, providing for resort to an international tribunal, covered disputes relating only to the

individual interests of States under the provisions of Article 5. It is not possible for me to accept that the authors of a Mandate, the essential (and highly altruistic) purpose of which was the promotion by all the means in the Mandatory's power of the material and moral well-being and social progress of the inhabitants of the territory, when they came to Article 7 had lost the generous impulses by which they were inspired at the beginning and, selfishly, no longer had in mind, in the event of resort to international justice, anything more than the individual legal interest of States Members. This would not fit in with the context or with the terms of the provision itself, which reads:

> " . . . 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 . . .".

I therefore believe the claims of Ethiopia and Liberia to be completely admissible.

I therefore consider that it was the duty of the Court to examine the Applicants' complaints, and adjudge and declare them to be well-founded or otherwise.

It was the duty of the Court to declare whether South Africa, as Mandatory, is properly and conscientiously performing its obligations under the Mandate.

For example, the Court was under a duty to declare:

whether or not racial discrimination, erected into a doctrine by the Mandatory, instituted by law and systematically applied in South West Africa, is likely to promote "the material and moral well-being and the social progress of the inhabitants of the territory" as required by the second paragraph of Article 2 of the Mandate;

whether or not laws and regulations based on apartheid and reflected in measures which are for the most part disadvantageous or offensive to people of colour are likely to promote "the material and moral well-being and the social progress of the inhabitants of the territory" as required by the second paragraph of Article 2 of the Mandate;

whether or not the exclusion of the Natives from certain occupations because of their race, colour or tribal origin is likely to promote "the material and moral well-being and the social progress of the inhabitants of the territory" as required by the second paragraph of Article 2 of the Mandate;

whether or not the prohibition whereby Natives, because of their race and colour, are forbidden to live in a particular district, stay in a particular hotel, be on the streets at particular times and occupy particular seats in public transport is likely to promote "the material and moral well-being and the social progress of the inhabitants of the territory" as required by the second paragraph of Article 2 of the Mandate.

Certainly the Mandatory is given a very wide latitude in the choice of methods of administration by the first paragraph of Article 2 of the Mandate, which reads as follows:

> "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require." (First paragraph of Article 2 of the Mandate for German South West Africa.)

However, this discretionary power 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 over South West Africa. 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]*. In my view it was the Court's duty to list and analyse the laws and regulations applied by the Mandatory in the mandated territory, to probe the Mandatory's acts, and then to adjudge and declare whether or not such laws, regulations and acts are designed to promote "the material and moral well-being and the social progress of the inhabitants of the territory" as required by the second paragraph of Article 2 of the Mandate.

It is not playing politics or taking into account only ethical or humanitarian ideals to ascertain whether the Mandatory's policies are a breach of the provisions of the Mandate, which is the subject-matter of the dispute; for a Court seised of a breach of obligations under the Mandate is competent to appraise all the methods used in the application of the Mandate, including the political methods. The Court would be within its powers in declaring whether or not the policy of apartheid on which the laws and regulations applied in the Mandated Territory of South West Africa are based is conducive to the purpose laid down in the second paragraph of Article 2 of the Mandate. In fact by now the Court is the only body which can do so, since the Mandatory has obstinately declined to accept any international supervision.

The Court's silence concerning the Mandatory's conduct is disturbing when it is recalled that the very same Court, in its earlier Judgment of 1962, upheld its jurisdiction to adjudicate upon the merits of the dispute. The Court now declines to give effect to the claim of Ethiopia and Liberia on the ground that the Applicants have no legal interest in the action. I repeat once again my conviction that the classic notion of individual legal interest is not the only acceptable one, and that it is not necessarily applicable in proceedings instituted with reference to the interpretation and application of an international mandate, the beneficiaries of whose provisions are not the States which subscribed to them but African peoples who have no access to the Court because they do not yet constitute a State. Nor is the doctrine of legal interest one of crystalline

clarity. Distinguished lawyers when discussing the subject have on occasion had to admit that "the concept of interest is however inherently vague and many-sided . . ." (Paul Cuche, quondam Dean of the Grenoble Law Faculty; Jean Vincent, Professor of Law and Economics at Lyon University. *Précis Dalloz*, 12th ed., 1960, p. 19.)

Can it be categorically affirmed that Ethiopia and Liberia have no legal interest at all in securing the proper application of an international mandate held on behalf of the League of Nations of which they were Members? I do not think so.

What is to happen now? How is a peaceful solution to the present dispute to be found? In the reasoning of its earlier judgment of 21 December 1962 in the same case, the International Court of Justice held:

> "The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the 'sacred trust' toward the inhabitants of the mandated territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.
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> The *raison d'être* of this essential provision in the Mandate is obvious. Without this additional security the supervision by the League and its Members could not be effective in the last resort." (*South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 336.)

And now the position today. What value does this Court now attach to "the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate"? Apparently all that is now relevant is the individual legal interest of the Applicant States, and recourse to the Court no longer appears, as in 1962, as the final bulwark of protection against possible abuse or breaches of the Mandate. Who henceforward will be able to seise the Court of the possible abuses or breaches of the Mandate of which thousands of Africans may be the victims?

Since in 1962 the Court upheld its "jurisdiction to adjudicate upon the merits of the dispute" it was its duty, today, to declare whether or not South Africa has committed abuses in South West Africa and is in breach of its obligations under the Mandate. For that is the real merits of the dispute, not merely an arid scrutiny and relentless analysis of the individual legal interest of the Applicant States, Ethiopia and Liberia, which, in the last resort, did no more than have recourse legitimately and legally to "the final bulwark of protection . . . against possible abuse or breaches of the Mandate" (to use the Court's own terms).

If the Court had only consented to take its examination of the merits a little further it would have found the multiplicity of impediments put in the way of coloured people in all fields of social life. Barriers abound:

in admission to employment, in access to vocational training, in conditions placed on residence and freedom of movement; even in religious worship and at the moment of holy communion.

Creating obstacles and multiplying barriers is not, in my view, a way to contribute to the promotion of "the material and moral well-being and the social progress of the inhabitants of the territory". It is, on the contrary, a manifest breach of the second paragraph of Article 2 of the Mandate.

(Signed) Isaac FORSTER.