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

* * *

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

100. For these reasons,

THE COURT,

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

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

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

(Signed) Percy C. SPENDER,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Percy SPENDER makes the following declaration:

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

2. Having so decided, the Court's task was completed. It was not necessary for it to determine whether the Applicants' claims should or could be rejected on any other grounds. Specifically it was not called upon to consider or pronounce upon the complex of issues and questions involved in Article 2 of the mandate instrument ("The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate"); or Article 6 thereof ("The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5"); or to enter into a legal enquiry as to what it would or might have decided in respect to these and related matters had it not reached the decision it did. To have done so would, in my view, have been an excess of the judicial function.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Initialled) P. C. S.

(Initialled) S. A.