DISSENTING OPINION OF JUDGE PADILLA NERVO

I voted against the decision of the Court because I am convinced that it has been established beyond any doubt, that the Applicants have a substantive right and a legal interest in the subject-matter of their claim; the performance by the Mandatory of the sacred trust of civilization, by complying with the obligations stated in Article 22 of the Covenant of the League of Nations; and in the Mandate for German South West Africa.

Furthermore, the Applicants, by virtue of Article 7 of the Mandate (an instrument which is "a treaty or convention in force", within the meaning of Article 37 of the Statute), have a right to submit their dispute with the Respondent, to this International Court of Justice.

The present case is not an ordinary one, it is a *sui generis* case with far-reaching implications of juridical, social and political nature. It has been, since its inception, a complex, difficult and controversial one, as can be seen, by the fact that the present decision of the Court, to which I am in fundamental disagreement, rests on a *technical* or *statutory* majority, resulting from the exercise by the President of his prevailing vote, in accordance with paragraph 2 of Article 55 of the Statute of the Court, which reads:

> "1. All questions shall be decided by a *majority* of the Judges present.
>
> 2. In the event of an *equality* of votes, the President or the Judge who acts in his place, shall have a *casting* vote." (Italics added.)

The Court has dealt with one single question, namely: Have the Applicants a legal interest in the subject-matter of the claim? Upon this the Court has found—

> "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. For these reasons, the Court decides to reject the claims of the Empire of Ethiopia and the Republic of Liberia."

The Court, in my view, has been able to do that from an unwarranted assumption of the presumed intentions of the framers of the Covenant and the mandates system in 1919, and from an analysis and *interpretation* of such instruments consequent with the particular assumption, which serves as basis or premise of the Court's analysis and reasoning. This process, has accordingly led the Court to its present decision.

The Court answered that question in due application of paragraph 2 of Article 55. In consequence, the Court's present decision states the reasons and arguments, in view of which, it finds that the Applicants do not have a substantive right or legal interest in the claim.

Since I hold that the Court has jurisdiction to pass on the merits of the Applicants' claim and that the claim is admissible because the Applicants have the legal interest and other qualifications entitling them to recover judgment on those claims, I am bound to express my opinion on the issues raised by the Parties' submissions.

As an introduction to my reasons for disagreeing with the Court's decision, I will make some observations regarding the characteristics of the Covenant of the League of Nations, the nature and implications of the sacred trust, established by Article 22, and the significance and purpose of the mandates system.

I will start by quoting the Parties' submissions, which have been presented, explained and developed through such a long period of time, effort and expense, in the written and oral proceedings.

In the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia, at the hearing on 19 May 1965:

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

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

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

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

(4) Respondent, by virtue of economic, political, social and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has, in the light of applicable *international standards or international legal norm, or both, failed to promote to the utmost* [1] the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles;

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

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

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

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

(9) Respondent has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent

[1] Italics added.

of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of Respondent, directly or indirectly, to modify the terms of the Mandate.

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

On behalf of the Government of South Africa, at the hearing on 5 November 1965:

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

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

In particular, Respondent submits—

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

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

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

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

* * *

The majority of the Court is reproducing on the present occasion the arguments adduced in dissenting opinions against the Judgment of 1962.

In my view the Court has been able to arrive at its conclusion by *assuming*, beforehand, the correctness of *its interpretation* of Article 7 (2) of the Mandate for German South West Africa, which is the main basis of its reasoning.

The questions raised by the Parties' submissions in the present proceedings (relevant to the Court's present decision) are in fact a repetition of the submissions presented by the Parties in 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 322-328).

Those questions have been already decided by the Court in its 1962 Judgment and, among them, those regarding the Applicants' *locus standi* and the admissibility of their claim.

On page 328, the Court then said:

> "To found the jurisdiction of the Court in the proceedings, the Applicants, 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 South West Africa, and Article 37 of the Statute of the Court. In response to the Applications and Memorials of Ethiopia and Liberia, the Government of South Africa filed Preliminary Objections to the jurisdiction of the Court."

Such Preliminary Objections read as follows (*ibid.*, p. 326):

> "*On behalf of the Government of South Africa*, in the Preliminary Objections:
>
> 'For all or any of the reasons set out in these Preliminary Objections, 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 Honourable Court has no jurisdiction to hear, or adjudicate upon, the questions of law and fact raised in the Applications and Memorials; and prays that the Court may adjudge and determine accordingly.'
>
> *On behalf of the Governments of Ethiopia and Liberia*, in the written Observations on the Preliminary Objections:
>
> 'May it please this Honourable Court to dismiss the Preliminary Objections raised by the Government of the Republic of South Africa in the South West Africa cases, and to adjudge and declare that the Court has jurisdiction to hear and adjudicate the questions of law and fact raised in the Applications and Memorials of the Governments of Ethiopia and Liberia in these cases.' "

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

> "*On behalf of the Government of South Africa*, at the hearing on 11 October 1962:

'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.'

On behalf of the Governments of Ethiopia and Liberia, at the hearing on 17 October 1962:

'May it please the Court to dismiss the Preliminary Objections raised by the Government of the Republic of South Africa in the South West Africa cases, and to adjudge and declare that the Court has jurisdiction to hear and adjudicate the questions of law and fact raised in the Applications and Memorials of the Governments of Ethiopia and Liberia in these cases.' "

Questions having been put to the Parties by two Judges, the Court decided that the answers to them should be given after the oral rejoinder, first on behalf of the Republic of South Africa and then on behalf of Ethiopia and Liberia; and that, in the same order, the Agents should be called upon to indicate whether those questions and the answers given to them had led them to amend their respective submissions and, if so, to present the amended submissions.

Availing themselves of this decision, the Agents of the Parties gave their answers on 22 October 1962. The Agent of the Republic of South

Africa amended the submissions which he had read at the hearing on 11 October by substituting the following paragraph for the paragraph commencing with the word "Firstly":

> "Firstly, the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations 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 Mandate as a whole, including Article 7 thereof; and
>
> *(b)* in any event, with respect to Article 7 itself."

After due consideration of the issues involved, the Court in its 1962 Judgment, *rejected* the four Preliminary Objections and decided that:

(1) the Applicants have *locus standi*;
(2) the Applicants were Members of the League and could then and can now invoke the jurisdiction of the International Court of Justice in accordance with Article 37 of the Statute;

(3) a *dispute*, as envisaged in Article 7 of the Mandate, does exist between the Parties;
(4) the dispute *cannot be settled* by negotiation.

In respect to the Respondent's contention: that the dispute brought before the Court by the Applicants does not affect any material interest of the Applicant States or their nationals, and their further contention that the League Members have no legal right or interest in the observance by the Mandatory of its duties to the inhabitants; the Court then said:

> "The question which calls for the Court's consideration is whether the dispute is a 'dispute' as envisaged in Article 7 of the Mandate and within the meaning of Article 36 of the Statute of the Court.
>
> 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 any one particular provision or provisions, but to 'the provisions' of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward 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. 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 both toward the inhabitants of the Mandated Territory,

and toward the League of Nations and its Members." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 343.)

Such was the analysis made by the Court in its 1962 Judgment, of the relevant texts of the Mandate, regarding, in particular, the wording of Article 7 and the meaning of the term: "the provisions . . ."

Now the Court's majority makes a contrary interpretation, and for the purpose of its argument, artificially divides the "provisions" in the Mandate into two different categories, with different effects and implications, in support of its argument.

The Court now asserts that there are on the one hand, what it calls "conduct of the Mandate" provisions; and on the other hand "special interest" provisions. (This is also the Respondent's contention.)

I believe that such classification and the meaning and function given to it, does not follow from the letter or the spirit of the Mandate; and that the Court's interpretation in 1962 is the correct one.

Those mentioned above were, among others, the main findings of the Court in 1962. The considerations and reasons for its findings are summarized in the following statements, contained in the Court's Judgment (*ibid.*, pp. 328-347), which in my opinion, should have been confirmed by the Court today if it had decided, in relation to the merits, to examine the Applicants' claim and to adjudicate on the Parties' submissions; after having heard the Parties on all the elements involved, as indeed it did.

Such statements assert that:

(a) the Applicants do have *locus standi*;
(b) the Court has jurisdiction to hear and adjudicate the question of law and fact, raised by the Applicants;
(c) the Mandate is a "treaty or convention in force" within the meaning of Article 37 of the Statute. It is an international agreement, having that character;
(d) a dispute exists between the Parties before the Court, constituted by their opposing attitude relating to the performance of the obligations of the Mandate (*ibid.*, p. 328);
(e) the Mandate is an international instrument of an institutional character (*ibid.*, p. 332);
(f) the authority which the Respondent exercises over South West Africa is based on the Mandate. If the Mandate lapsed, so did the Respondent's authority. To retain rights and deny obligations, is not justified (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950; South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 333);
(g) the obligation to submit to international supervision, is of the very essence of the Mandate and cannot be excluded;

(h) the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court, according to Article 37 of the Statute and Article 80 (1) of the Charter *(International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950)*;

(i) the finding that Article 7 is "still in force", was unanimous in 1950 and continues to reflect the Court's Opinion in 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 334);

(j) the obligation to submit to compulsory jurisdiction was effectively transferred to the International Court before the dissolution of the League;

(k) the Mandate as a whole, including of course Article 7, is still in force (*ibid.*, p. 335);

(l) judicial protection of the "sacred trust" was an essential feature of the mandates system, the duty and right of insuring the performance of this trust was given to the League, its organs and all its Members;

(m) in the event of a veto by the Mandatory under the unanimity rule (Articles 4 and 5, Covenant), the only course left to defend the interests of the inhabitants would be to obtain adjudication by the Court (*ibid.*, p. 337);

(n) as neither the Council nor the League was entitled to appear before the Court, the only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute to the Permanent Court for adjudication. Article 7 played an essential part as one of the securities in the mandates system (*ibid.*, p. 337);

(o) the right to implead the Mandatory before the Permanent Court, was specially and expressly conferred on the Members of the League because it was the most reliable procedure of ensuring protection;

(p) the clear and precise language of Article 7 refers to any dispute relating to "the provisions", meaning all or any provisions (*ibid.*, p. 343);

(q) the scope and purport of Article 7 indicate that the Members of the League were understood to have a legal right or interest in the observance of the Mandatory's obligations towards the inhabitants of the territory (*ibid.*, p. 343);

(r) article 7 is clearly in the nature of implementing one of the "securities for the performance of this trust", mentioned in Article 22 (1);

(s) the present dispute is a dispute as envisaged in Article 7;

(t) repeated negotiations over a period of more than ten years, in the General Assembly and other organs of the United Nations had reached a deadlock before 4 November 1960 and the impasse continues to exist. No reasonable probability exists that further negotiations would lead to a settlement;

(u) diplomacy by conference or parliamentary diplomacy, has come

to be recognized as one of the established modes of international negotiation, and in cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, it has often been found to be the most practical form of negotiation. If the question at issue is one of mutual interest to many States, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State, after they have participated in the collective negotiation with the same State in opposition;

(v) the Court concludes that Article 7 is a treaty or convention still in force and that the dispute cannot be settled by negotiation. Consequently, the Court is competent to hear the dispute on the merits (*ibid.*, p. 347).

* * *

In the present proceedings, the Court has jurisdiction to adjudicate upon the merits of the dispute (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 347).

The merits of the dispute have been presented and developed before the Court through the written and oral arguments of the Parties to the present case.

Much time, effort and expense have been used in these pleadings, and the Court is acquainted with all the necessary elements to form a considered opinion and to pass on the merits of the Applicants' claim.

This, in my opinion, the Court should have done, and the majority should not have limited and restricted the whole field of these contentious proceedings on the merits to the narrow point of the question regarding legal interest or substantive right.

It cannot be ignored that the status of the mandated territory of South West Africa is the most explosive international issue of the post-war world; and the question whether the official policy of "apartheid" as practised in the Territory, is or is not compatible with the principles and legal provisions stated in the Covenant, in the Mandate and in the Charter of the United Nations, begs an answer by the Court which, at the present stage, is dealing with the merits of the case.

During these proceedings of exceptionally long duration, the Court has been hearing and examining the arguments of the opposing Parties in support of their respective *submissions*, requesting the Court to adjudge and declare upon them. Nevertheless, the majority of the Court has deemed fit and proper not to do this, thus rendering it unnecessary for it to pass on the main issues on the ground 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".

I disagree—as I said before—with this finding of the Court which, in my opinion, is unjustified. This point was not in issue in the proceedings at the present stage; the question of the legal right or interest of the Applicants was already decided by this Court—expressly or by implication—in its 1962 Judgment.

I believe that the Applicants' legal interest in the performance by the Mandatory of its obligations under the Mandate derives not only from the spirit, but from the very terms of the Covenant and the Mandate, and is clearly expressed in Article 7 (2).

The Court now decided to examine first the questions which it considered of antecedent and fundamental character, "in the sense that a decision respecting any of them might render unnecessary an enquiry into other aspects of the case".

I cannot agree with the Court in the assertion that: "it became the Court's duty" to follow that course; because such course unavoidably prevented *adjudication in respect to the main issues* of the official policy of apartheid and the compliance with the obligations stated in the Covenant and in Article 2 (2) of the Mandate. In my opinion, the duty of the Court was to adjudicate on such main issues.

THE COVENANT

The Covenant is in the nature of a constitutional legal instrument, which is the source of rights and obligations relating to the system of mandates, and to the securities and safeguards for the performance of the sacred trust.

The principle proclaimed in Article 22 and its provisions, are binding on the Members of the League, which were willing to accept the tutelage and exercise it as mandatories on behalf of the League, in the interest of the indigenous population.

The Council of the League defined the degree of authority, control, or administration to be exercised by the Mandatory for South West Africa, in the terms that the Principal Allied and Associated Powers did propose that the Mandate should be formulated.

The purpose of the Mandate for South West Africa—in the terms defined by the Council—is to give practical effect to the principle of the sacred trust of civilization. The Mandate is the "method" chosen by the Allied and Associated Powers to accomplish that end.

The legal obligations stated in the Covenant were translated and spelled out in the specific case of each mandate, "according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances".

All mandates—regardless of their differences in character—had a common denominator; all were established for the same reason, and with the object and purpose of giving practical effect, to the principle that the well-being and development of the peoples inhabiting the territories concerned, form a sacred trust of civilization.

The sacred trust is not only a moral idea, it has also a legal character and significance; it is in fact a legal principle. This concept was incorporated into the Covenant after long and difficult negotiations between the parties over the settlement of the colonial issue.

It has been observed in that respect that:

"It was clearly understood by all concerned that what was involved was the adoption, with respect to the treatment of indigenous peoples in certain areas of Africa and Asia, of a principle entirely different from that in effect until then. The new principle was that, as a matter of international law, the well-being and social progress of such peoples would be the responsibility of the 'organized international community', insured by legal, rather than by solely moral, considerations."

THE MANDATES SYSTEM

The Court gives the following account on this question:

"Inasmuch as the grounds on which the Preliminary Objections rely are generally connected with the interpretation of the Mandate Agreement for South West Africa, it is also necessary at the outset to give a brief account of the origin, nature and characteristics of the Mandates System established by the Covenant of the League of Nations.

Under Article 119 of the Treaty of Versailles of 28 June 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions. The said Powers, shortly before the signature of the Treaty of Peace, agreed to allocate them as Mandates to certain Allied States which had already occupied them. The terms of all the 'C' Mandates were drafted by a Committee of the Supreme Council of the Peace Conference and approved by the representatives of the Principal Allied and Associated Powers in the autumn of 1919, with one reservation which was subsequently withdrawn. All these actions were taken before the Covenant took effect and before the League of Nations was established and started functioning in January 1920. The terms of each Mandate were subsequently defined and confirmed by the Council in conformity with Article 22 of the Covenant.

The essential principles of the Mandates System consist chiefly in recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a régime of tutelage for each of such peoples to be exercised by an advanced nation as a 'Mandatory' 'on behalf of the League of Nations'; and the recognition of 'a sacred trust of civilization' laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights.

These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. The rights of the Mandatory in relation to the mandated territory and the inhabitants

have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations. The fact is that each Mandate under the Mandate System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.)

The Principle of Non-Discrimination

The United Nations and the General Assembly were entrusted with special tasks under the Charter of the United Nations and, among other tasks, to "encourage and promote respect for human rights and for fundamental freedoms for all, without distinction as to race . . . etc." —Article 76 *(c)*, Article 1 (3). The General Assembly has competence in respect of the interpretation of the Charter, and power to enact recommendations—regarding racial discrimination—which have evolved as principles or standards of general international acceptance.

The principle of non-discrimination on account of race or colour has a great impact in the maintenance of international peace, and the Organization has the duty to ensure that all States—even those which are not Members—shall act, in accordance with the principles of Article 2 of the Charter, in the pursuit of the purposes stated in Article 1—among them—to promote and encourage respect for human rights and fundamental freedoms for all, without racial discrimination (Article 1 (3)).

Significance of the Recommendations of the General Assembly

Nobody would dispute the powers of the General Assembly to discuss these matters, like racial discrimination, in general, but especially when it occurs in a mandated territory which has an international status, and is an institution or régime of its concern.

The International Court is guided by its Statute and its Rules, but even the Court's functions and powers may be discussed by the General Assembly, which may make recommendations (to the United Nations Members) in respect to them, and propose or evolve additional subsidiary means, which the Court should apply for the determination of rules of law.

The numerous and almost unanimous recommendations regarding "apartheid" and racial discrimination, are made to the Members of the United Nations and not to the members of the Court, but the Court cannot overlook or minimize their overriding importance and relevance in these particular cases. Those recommendations might be considered,

in fact, as a manifestation of some of the directives that the Court should apply, in accordance with Article 38, in the performance of its function.

An important question in the present cases is whether or not the road we follow leads us to a conclusion which is just, fair and capable of contributing to the maintenance of world peace. Such a conclusion cannot run contrary to the essential principles of the mandates system or those of the trusteeship system, and should be in harmony with world opinion and the constitutional practice of States regarding racial discrimination, human rights and fundamental freedoms. These declarations are guides of conduct and rules, having their rightful source in the Charter and in the binding decisions, on all Member States, emanating from the General Assembly and other organs of the United Nations.

There were times when certain words and their obvious or hidden meanings were taboo for the common man and abhorrent to the legal mind; but wise men made from those revolutionary concepts, universally accepted principles: "Liberté, Egalité, Fraternité"; "The Government of the people, for the people, by the people".

Constitutional instruments, like the Constitution of the United States, which were proclaimed "in the name of the people", were received at the time with ironical surprise in certain parts of the civilized world. One century and 70 years later, the Charter of San Francisco began: "We the peoples of the United Nations determined . . ."

All these considerations do not run counter to the main task of the Court to "declare" the law. They are in fact—I believe—expressed or implied in the juridical and learned reasoning and decisions given in the Opinions of 1950 and 1956, and in the Judgment pronounced by this Court in 1962.

This idea of concern for the people, for the recognition of the role of the common man, and especially for the peoples "not yet able to stand for themselves under the strenuous conditions of the modern world", was the one that moved the authors of the Covenant and is at the roots of the Mandate.

For the interpretation of the Mandate according to its spirit and its letter, the dissolution or liquidation of the League is not of permanent importance, since the Mandate did survive and is in existence. But for a just interpretation of its terms and spirit, it is important to keep in mind that such interpretation is being made today; that this Court is sitting in 1966 and not in 1920, and that the international community of today, the United Nations, has the right and the duty to see that the sacred trust is performed. For that reason and to that effect, many resolutions were adopted in the General Assembly, and are relevant and of the greatest importance in the consideration of the *South West Africa* cases.

Important also is the fact that *the 1950 Opinion is the "law recognized*

by the United Nations" [1] and the Respondent, as a member State, should comply with it. The Court should not disregard such Opinion or the pronouncements made in its 1962 Judgment. Nor should the Court ignore that the Respondent is obliged to account and report to the satisfaction of the supervisory organ, since "the securities for the performance of the sacred trust of civilization, are the supervision and control by the International Organization".

It is therefore in the exercise of its rights and duties that the General Assembly, through its resolutions, has judged the application in the mandated territory of the official policy of racial discrimination, and recognized the rules and standards which the Mandatory by this policy of apartheid contravenes, in violation of its obligations under the Mandate, obligations which are not dormant at all, but alive and in action, as are equally well alive and not dormant the rights of the peoples of the Territory who are the beneficiaries of such obligations.

No argument of strict, specific or classical law may justify a reversion of the Judgment of 1962, or ignore the claims and hopes of public opinion the world over, regarding respect for human rights and fundamental freedoms for all, without racial discrimination.

A new order based on the proposition that "all men are by nature equally free and independent", has conquered solemn recognition in the basic law of many nations and is today—in one form or another—customary declaration, norm and standard in the constitutional practice of States. "Equality before the law", or in the words of the Charter: "International cooperation in the promotion and respect of human rights and fundamental freedoms for all without distinction as to race . . ."

This fundamental resolve will inspire the vision and the conduct of peoples the world over until the goal of self-determination and independence is reached.

THE 1950 ADVISORY OPINION AND THE 1962 JUDGMENT

The concepts expressed on the occasion of the 1950 Opinion are fundamental for the consideration of the case in the present procedure. The 1962 Judgment is based on this Opinion and the Court, in my view, is bound to abide by the conclusions given in that Judgment in respect to the legal interest of the Applicants and the admissibility of the claim. Furthermore, the Court cannot ignore the conclusions arrived

[1] After the 1950 Opinion had been accepted and approved by the General Assembly it was the "law recognized by the United Nations". (Judge Lauterpacht, in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, p. 46.)

at in its Advisory Opinions of 1950 and 1956, taking into account that:

> "In exercising its discretion [to give an Advisory Opinion] the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia*" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155),

to the effect that:

> "The Court, being a Court of Justice cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29.) [1]

In order to omit quotations from the Court's Opinions, while dealing with particular issues, I will emphasize at the outset some of the points, reasoning and conclusions of the Court in its 1950 Advisory Opinion and in its 1962 Judgment, in which I find support for my own views.

* * *

An international régime, the mandates system, was created by Article 22 with a view to giving practical effect to the two principles of *(a)* non-annexation, and *(b)* that the well-being and development of the peoples inhabiting the mandated territories, not yet able to stand by themselves, form "a sacred trust of civilization".

The creation of this new international institution did not involve any cession of territory or transfer of sovereignty, and the Union was to exercise an international function of administration on behalf of the League of Nations.

The Mandate was created in the interests of the inhabitants and of humanity in general, as an international institution with an international object—a sacred trust of civilization.

The international rules regulating the Mandate constituted an international status for the territory.

The functions were of international character and their exercise, therefore, was subjected to the supervision of the Council of the

[1] Hammarskjøld, *La juridiction internationale* (Leyde, 1938), p. 289. He also quoted from the report submitted by Judges Loder, Moore and Anzilotti, in 1927, that the view that advisory opinions are not binding is more theoretical than real. (*Series E, No. 4*, p. 76.)

"In this connexion, it may be recalled that in using judicial decisions as a 'source of law' by virtue of Article 38 (1) *(d)* of the Statute, no distinction at all is made between judicial decisions given in the form of a judgment, and judicial decisions given in the form of an advisory opinion. Recourse is equally had to both types of judicial decision." (Rosenne, *The International Court of Justice*, 1957, p. 493, note 2.)

League of Nations and to the obligation to submit annual reports.

Obligations: *(a)* administration as a "sacred trust"; *(b)* machinery for implementation, supervision and control as "securities for the performance of this trust". These obligations represent the very essence of the "sacred trust". Their fulfilment could not be brought to an end, nor the rights of the population with the liquidation of the League, as they did not depend on the existence of the League.

The provisions of paragraph 2 of Article 80 of the Charter presuppose that the rights of States and peoples shall not lapse automatically on the dissolution of the League.

The resolution of the League's Assembly of 18 April 1946 had to recognize that the functions of the League terminated with its existence, at the same time the Assembly recognized that Chapters XI, XII and XIII of the Charter embodied the principles declared in Article 22 of the Covenant of the League of Nations.

In paragraph 4 of that resolution, the Mandatory Powers recognized that some time would lapse from the termination of the League to the implementation of the trusteeship system, and assumed the obligation to continue nevertheless, in the meantime, to administer the territories under mandate, for the well-being of the peoples concerned, until other arrangements have been agreed between them and the United Nations.

The Assembly understood that the mandates were to continue in existence until "other arrangements" were established, concerning the future status of the territory.

Maintaining the "status quo" meant: to administer the territory as a sacred trust and to give account and report on the acts of administration.

There are decisive reasons for an affirmative answer to the question whether the supervisory functions of the League are to be exercised by the new international organization created by this Charter.

The authors of the Covenant considered that the effective performance of the sacred trust of civilization required that the administration of the mandated territories should be subjected to international supervision.

The necessity for supervision continues to exist. It cannot be admitted that the obligation to submit to supervision has disappeared, merely because the supervisory organ under the mandates system has ceased to exist, when the United Nations has another international organ performing similar supervisory functions.

Article 80, paragraph 1, of the Charter, purports to safeguard the rights of the peoples of mandated territories until trusteeship agreements are concluded, but no such rights of the peoples could be effectively

safeguarded without international supervision and a duty to render reports to a supervisory organ.

The resolution of 18 April 1946 of the Assembly of the League presupposes that the supervisory functions exercised by the League would be taken over by the United Nations, and the General Assembly has the competence derived from the provisions of Article 10 of the Charter, and is legally qualified to exercise such supervisory functions.

On 31 January 1923 the Council of the League adopted certain rules by which the mandatory governments were to transmit petitions. This right which the inhabitants of South West Africa has thus acquired is maintained by Article 80, paragraph 1, of the Charter.

The dispatch and examination of petitions form a part of the supervision, and petitions are to be transmitted by the Union Government to the General Assembly, which is legally qualified to deal with them.

The Court was of the opinion that Article 7 of the Mandate is still in force and that having regard to Article 37 of the Statute of the international Court and Article 80 (1) of the Charter, the Union Government is under an obligation to accept the compulsory jurisdiction of the Court.

The Union has no competence to modify unilaterally the international status of the territory, as is shown by Article 7 of the Mandate. The competence to determine and modify the international status of South West Africa rests with the Government of South Africa acting with the consent of the United Nations.

* * *

I will now express my views on the points involved in what I believe to be the main issues:

(a) that the Court has jurisdiction to adjudicate on the merits in the present case;

(b) that the claims are admissible;

(c) that the Mandate did not lapse, is in existence and still in operation;

(d) that the decision of the 1962 Judgment, based on the 1950 and 1956 Advisory Opinions, is *res judicata* between the Parties, especially in respect of jurisdiction and the survival of the Mandate, and that the issue of the *locus standi* of the Applicants is also *res judicata*;

(e) that the Mandate is a "Treaty or Convention in force" within the meaning of Article 37 of the Statute;

(f) that the Court—regardless of the question whether it is legally bound by its previous judgments—has no grounds nor weighty reasons to reconsider nor reverse the 1962 decision or to ignore the moral, political and juridical authority of the 1950 and 1956 Advisory Opinions;

(g) that the Mandatory has the obligation to make annual reports

(Article 6), and transmit petitions, and submit to internationa supervision;

(h) that the General Assembly, after the dissolution of the League, is the supervisory organ with the functions formerly performed by the Council of the League, and this by virtue of the powers given to the General Assembly by Article 10 of the Charter, and in compliance with Article 80 and the spirit of Article 76, and the resolution of 18 April 1946 of the Assembly of the League;

(i) that Articles 6 and 7 of the Mandate are in full force and should be complied with, as being susceptible of performance toward the United Nations, which now represents the "organized International Community" created and intended to substitute the League of Nations;

(j) that the trusteeship system is the modern version of the mandates system, established with the purpose of maintaining the principles of it, and to transform every mandate into a trust territory or an independent State.

APPLICANTS' LEGAL INTEREST

The Respondent's contention that according to the wording in Article 7, paragraph 2, of the Mandate, the Applicants have not "*locus standi*", because since the dissolution of the League there could no longer be "another Member of the League of Nations" today, was a contention rejected by the Court in its 1962 Judgment. The Court said then in this respect:

> "This contention is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.
>
> In the first place, judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. The essence of this system as conceived by its authors and embodied in Article 22 of the Covenant of the League of Nations, consisted, as stated earlier, of two features: a Mandate conferred upon a Power as 'a sacred trust of civilization' and the 'securities for the performance of this trust'. While the faithful discharge of the trust was assigned to the Mandatory Power alone, the duty and the right of ensuring the performance of this trust were given to the League with its Council, the Assembly, the Permanent Mandates Commission and all its Members within the limits of their respective authority, power and functions, as constituting administrative supervision, and the Permanent Court was to adjudicate and determine any dispute within the meaning of Article 7 of the Mandate.

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."

"But neither the Council nor the League was entitled to appear before the Court. The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication."

It is said further in the same Judgment:

"... the Court sees no valid ground for departing from the conclusion reached in the Advisory Opinion of 1950 to the effect that the dissolution of the League of Nations has not rendered inoperable Article 7 of the Mandate. Those States who were Members of the League at the time of its dissolution continue to have the right to invoke the compulsory jurisdiction of the Court, as they had the right to do before the dissolution of the League. That right continues to exist for as long as the Respondent holds on to the right to administer the territory under the Mandate."

The Respondent, by virtue of its ratification of the United Nations Charter since 7 November 1945, has been subjected to the obligations and entitled to the rights thereunder, and is bound to accept the compulsory jurisdiction of the International Court, to which it had originally agreed to submit under Article 7 of the Mandate. Such obligation is embodied in Article 37 of the Statute, which forms an integral part of the Charter.

This transferred obligation was voluntarily assumed by the Respondent when joining the United Nations. There can be no question of lack of consent as regard this transfer of Respondent's obligation to this Court, under Article 7 of the Mandate, to submit to the compulsory jurisdiction of the Permanent Court.

The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force.

Paragraphs 2 and 3 of the last resolution of the League, adopted unanimously on 18 April 1946, are in their letter and spirit principles adopted by all Members of the United Nations as binding commitments under the Charter.

The principle that "no interest no action", does not necessarily mean "material" interest, and the argument that the Applicants cannot invoke

the jurisdiction of the Court in a dispute with the Respondent, because the said conflict or disagreement does not affect any material interest of the Applicant States or their nationals, has no decisive weight.

When the Covenant and the Mandate were approved, the right of an action before the Permanent Court was given to all Members of the League, because they were understood to have an interest in the observance by the Mandatory of its obligations toward the inhabitants of the territory and towards the Members of the League.

That interest was certainly far greater and superior to any material interests of their own, and was the legal basis of their right of action.

The history of the Covenant and the mandates system, the purposes, principles and conclusions embodied in them, give—in my view—solid foundation for the opinions expressed in respect to the main issues.

The purposes and the acts which gave birth to the fact of the permanent existence of the "sacred trust", and the machinery for the security of its performance, are of overriding importance, continuous existence and permanent value.

The States Members of the United Nations, the General Assembly, the Parties and the Court in last instance, are bound by their rules and principles, which peoples and governments alike are obliged to respect and to follow.

CONSIDERATIONS ON THE INTERPRETATION OF THE COVENANT AND THE MANDATE

The interpretation of the Mandate and the obligations of the Respondent, is to be made, taking into account, besides the text and spirit of the relevant instruments, the circumstances existing now in 1966, not only those which prevailed in 1920. The aims, the convictions, the needs of the peoples and States for the maintenance of peace, in the closely interdependent world of our days is, and should be a fundamental consideration in the mind of this Court.

The world of 1920 is gone; but the status and régime that the framers of the Covenant and the mandates system did establish, the international institution they did create for the fulfilment of the "sacred trust of civilization", will continue to be alive as long as there exist, anywhere, non-self-governing peoples, in need of the protection recognized and granted by those instruments, almost half a century ago.

The world of today is far removed and different from the one of the First World War. New interests, new needs and new laws, customs, norms, and standards of international behaviour are being created by the relentless forces of public opinion, in search of recognition by the

legislative and judicial bodies all over the world; and are today proclaimed or enacted by peaceful and normal procedures, or put into force by the sheer strength of peoples and States.

The statesmen, the jurists, legislators, and the courts of justice, they all have to recognize the realities of today, for the sake of freedom, justice and peace.

The Court is well aware of such realities and shall consider, in its interpretation of the relevant international instruments and obligations, the prevailing ideas and circumstances of today regarding human rights and fundamental freedoms; as well as regarding the actual meaning and universal recognition embodied now in the concepts "material and moral well-being and social progress", which is a dynamic concept.

The Court, in my opinion, is not limited by the strict enumeration of Article 38, whose prescriptions it is free to interpret in accordance with the constant evolution of the concepts of justice, principles of law and teachings of publicists.

NORM AND STANDARD

Racial discrimination as a matter of official government policy is a violation of a norm or rule or standard of the international community.

A norm of non-discrimination of universal application has been drafted independently of the Mandate and which governs Article 2.

This is a problem, therefore, of the proper recognition and evaluation of human rights and the impact of its observance on the peace of the world.

This Court's highest and most authoritative opinion on the principle of non-discrimination on account of colour, will have a far-reaching impact on the battle of the races or on their pacific co-existence.

It is not the juridical and learned legal opinion that matters only, but the influence the Court will have on the behaviour of peoples and governments, all over the world. The consequences, in the short and long run, place on the Court a tremendous burden, which cannot be lightened by the most profound and logical legal examination of any one single aspect of the case, excluding thereby to adjudicate on the fundamental issues raised in the submissions of the Parties.

* * *

The "tutelage" established by the Covenant was meant to endure as long as the peoples concerned are—so to speak—under age. The sacred trust of civilization is a legal principle and a mission, whose fulfilment

was entrusted to more civilized nations until a gradual process of self-determination makes the peoples of the mandated territories able to "stand by themselves in the strenuous conditions of the modern world".

The Mandatories have the duty, not only to "promote to the utmost the well-being and development" of such peoples entrusted to their care, but to do it by means and methods most likely to achieve that end, and which do not—by their very nature—run contrary to the intended goal. The Charter prescribes the roads which will lead to it; those of non-discrimination and respect for human rights and fundamental freedoms, among other ways and means which will help the peoples to overcome the hardships and strains of our time.

The dissolution of the League took place after the States Members of the United Nations had signed the San Francisco Charter and were bound by it as parties in a treaty that prevails over all others which may be incompatible with the Charter prescriptions (Article 103).

One of the main principles which informs and gives new spirit to an international instrument like the Covenant, was the principle of non-annexation, a noble idea to deter the military powers from taking advantage of the war situation, or claiming, by right of conquest, sovereignty and ownership over peoples and territories, formerly pawns in the colonial system or the reward of victory or of superior strength.

The new concept of the "sacred trust of civilization" created a new sense of international responsibility, which requires consultation with the peoples of the mandated territories and with the appropriate international organs, and to take into account their will and consent as a *sine qua non* condition for effecting changes in the status of such territories.

These new ideas were intended to help in the organization of a new world order, in which backward people, on all continents, would have a chance to be free from the former traditional chains of slavery, forced labour, and preys of greedy masters.

Those noble ideas, principles and concepts, embodied in the Covenant, were not born to have a precarious or temporary existence, tied up to the mortal fate of a particular forum or to an international organization immune to changes.

They were intended to survive and prevail to guide the political conduct of governments and the moral behaviour of men. They were meant to persist and endure no matter what new social structures or juridical forms will evolve and change through the passing of time in this ever-changing world.

The dissolution of the League was not the funeral of the principles and obligations consigned in the Covenant and the Mandate; they are alive and will continue to be alive.

The Mandate has not lapsed, but has been, is and will be in existence,

as long as South West Africa is not placed under the trusteeship system by agreement between the Republic of South Africa and the United Nations; or until the time comes when the peoples of the Territory are able to stand by themselves under the strenuous conditions of the world of today, or eventually become an independent State.

These are, I believe, the only peaceable avenues which might lead to a modification of the actual status of South West Africa.

* * *

The League of Nations was dissolved because the United Nations had been established with a Charter which was an improvement on the Covenant, whose essential principles and ideals were kept and embodied in such Charter.

No time-limit was or could be established for the "sacred trust of civilization".

The counterpart of annexation was to place the territories under a régime administered internationally.

The character of the Mandate and the power of administration given to the Mandatory in Article 2 (1) of the Mandate, has its foundation in the reasoning and considerations stated in paragraphs 3 and 6 of Article 22 of the Covenant Paragraph 6 contains the following concepts:

> "There are territories, such as South West Africa ... which, owing to the sparseness of their population ... or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory ... can be best administered under the laws of the Mandatory ... subject to the safeguards above mentioned in the interests of the indigenous population."

Of no place in the world nowadays can one properly talk about "their remoteness from the centres of civilization". Now all countries and peoples everywhere are near and neighbours to each other. Isolation does not really exist unless imposed by force.

The sparseness of population is becoming everywhere a thing of the past; the birth rate and the number of people cannot be measured by the figures of 50 years ago. The earth has become more than ever a melting-pot, crowded to overflowing and is subject to the everlasting pressure and impact of dynamic cross-currents of interchanging of peoples, cultures, ideas and reciprocal influences of all conceivable kinds.

Much can be said also of the number, location and identity of the "centres of civilization" which the framers of Article 22 of the Covenant had in mind.

So the discretion in the power of administration and legislation claimed by the Mandatory was founded on reasons and circumstances which half a century later have become and appear obsolete. They were intended only to facilitate administration. (Article 2 (1) of the Mandate and Article 22 (6) of the Covenant.) The exercise of such power was subject to the obligations stated in the Covenant and in the Mandate. (Article 2 (2) among others.)

Obviously the power of administration and legislation could not be legitimately exercised by methods which run contrary to the aims, principles and obligations stated in Article 22 of the Covenant, especially in paragraphs 1, 2 and 6. Nor could be exercised today in violation of the United Nations Charter's provisions—among others—those regarding respect for human rights and fundamental freedoms, or the prohibition to discriminate on account of race or colour.

The assertion that "apartheid" is the only alternative to chaos, and that the peoples of South West Africa are incapable of constituting a political unity and be governed as a single State does not justify the official policy of discrimination based on race, colour or membership in a tribal group.

Paragraph 3 of Article 22 of the Covenant did not presuppose a static condition of the peoples of the territories. Their stage of development had to be transitory, and therefore the character of the Mandate, even of a given mandate, could not be conceived as a static and frozen one; it had to differ as the development of the people changed or passed from one stage to another. Are the people of South West Africa in the same stage of development as 50 years ago?

Are the economic conditions of the territory the same? Article 2 (2) of the Mandate states:

> "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."

Even if the geographical situation is to be considered under the angle of its remoteness from centres of civilization, and remoteness being a relative term, can it be said that South West Africa is now as remote as 50 years ago from centres of civilization?

I do not share the view that the Court, in the interpretation and application of the provisions of the Mandate, is limited or restricted in its jurisdiction to the narrow term of Article 7, paragraph 2, and has not jurisdiction to consider the existence and applicability of a "norm" and/or "standard" of international conduct of non-discrimination. In my view the jurisdiction of the Court is not so limited or restricted.

The Court cannot be indifferent to the fact that the Mandate operates under the conditions and circumstances of 1966, when the moral and legal conscience of the world, and the acts, decisions and attitudes of the organized international community, have created principles, and evolved rules of law which in 1920 were not so developed, or did not have such strong claims to recognition. The Court cannot ignore that "the principle of non-discrimination has been recognized internationally in most solemn form" (Jenks).

Since the far away years of the drafting of the Mandate, the inter-

national community has enacted important instruments which the Court, of course, must keep in mind, the Charter of the United Nations, the Constitution of the International Labour Organisation, the Universal Declaration of Human Rights, the Declaration on Elimination of All Forms of Racial Discrimination, and numerous resolutions of the General Assembly and the Security Council, having all a bearing on the present case for the interpretation and application of the provisions of the Mandate. All these instruments confirm the obligation to promote respect for human rights.

It has been said rather in soft terms, that "South African racial segregation policies appear to be out of harmony with the obligation under the Charter".

All this must be taken into account by the Court in determining whether it has been a breach of international law or of the obligation of the Respondent under the Mandate, as interpreted by the Court.

There are cases where—in the absence of customary laws—it is permissible to apply rules and standards arising from certain principles of law above controversy. The principles enacted in the Charter of the United Nations are—beyond dispute—of this nature.

The resolutions of the General Assembly are the consequence of the universal recognition of the principles consecrated in the Charter and of the international need to give those principles their intended and legitimate application in the practices of States.

The Court, as an organ of the United Nations, is bound to observe the provisions of the Charter regarding its "Purposes and Principles", which are of general application to the Organization as a whole and hence to the Court, as one of the principal organs of the United Nations, and whose Statute is an integral part of the Charter. As Rosenne remarks:

> "In general it cannot be doubted that the mutual relations of the principal organs ought to be based upon a general theory of co-operation between them in the pursuit of the aims of the Organization."

And Judge Azevedo: "The General Assembly has retained a right to watch over all matters concerning the United Nations." It has also been recognized that:

> "The Court must co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of other principal organs, and not achieve results which would render them nugatory."

The question whether or not the Respondent has complied with its obligations under Article 2 (2), is a sociological fact which has to be measured and interpreted by the current principles, rules and standards generally accepted by the overwhelming majority of States Members of the United Nations, as they were continuously expressed, through a great number of years, in the relevant resolutions and declarations of the

General Assembly and other organs of the international community, in accordance with the binding treaty provisions of the Charter.

It might be said that the ultimate decision on this question is a political one, to be evaluated by the General Assembly to whose satisfaction, as today's supervisory organ, the Mandatory has to administer the territory having an international status. The Court, however, in my view, should declare whether or not an official policy of racial discrimination is in conformity with the provisions of the United Nations Charter, and in harmony with principles of equality and non-discrimination based on race or colour, proclaimed and accepted by the international community.

The arguments and evidence presented by the Respondent for the purpose of attributing to the numerous resolutions on South West Africa, adopted by the General Assembly during the past 20 years, a political character and the claim that they have been politically inspired, do in fact emphasize the duty of the Court to give weight and authority to those resolutions of the General Assembly, as a source of rules and standards of general acceptance by the States Members of the International Organization.

The Court should also recognize those decisions as embodying reasonable and just interpretations of the Charter, from which has evolved international legal norms and/or standards, prohibiting racial discrimination and disregard for human rights and fundamental freedoms.

Many of the activities of the General Assembly and the Security Council—among them, those relating to the problem of South West Africa—are in the nature of political events concerned with the maintenance of international peace, which is also the concern of the Court, whose task is the pacific settlement of international disputes.

From those activities and under the impact of political factors, new legal norms or standards emerge.

Examining the close interrelation between the political and legal factors in the development of every branch of international law, Professor Rosenne makes some observations and comments which I consider pertinent to quote:

> "That interrelation explains the keenness with which elections of Members of the Court are conducted ... But that interrelation goes further. It explains the conflict of ideologies prevalent today regarding the Court." (Rosenne, *The Law and Practice of the International Court*, Vol. I, p. 4.)

> "The Charter of the United Nations and the urgency of current international problems and aspirations have turned the course of the Organized International Society into new directions ... The intellectual atmosphere in which the application today of international law is called, has changed, and with it the character of the

Court, as the Organ for applying international law, is changing too." (*Ibid.*, pp. 5-6.)

Rosenne remarks also that the full impact upon the Court of those changes is found in the activities of the General Assembly and the Security Council.

Whatever conclusions one might draw from these activities, it is evident that their far-reaching significance is the fact that the struggle towards ending colonialism and racism in Africa, and everywhere, is the overwhelming will of the international community of our days.

The Court, in my view, should take into consideration that consensus of opinion.

The General Assembly, as a principal organ of the United Nations, empowered to "discuss any questions or any matters within the scope of the present Charter" (Article 10), especially those questions "relating to the maintenance of international peace" (Article 11), and to "recommend measures for the adjustment of any situation resulting from a violation of the provisions of the Charter, setting forth the purposes and principles of the United Nations", has enacted, with respect to the situation in South West Africa, numerous resolutions—in the legal exercise of such functions and powers—resolutions which have the character of rules of conduct, standards or norms of general acceptance, condemning "racial discrimination" and violations of "human rights and fundamental freedoms", as contrary to the Charter, the Covenant and the Mandate.

There is no principle of general international law which could be validly invoked to contradict, or destroy, the essential purpose and the fundamental sources of the legal obligations rooted in the very existence of the Covenant, the mandates system and the Charter of the United Nations.

The resolutions of the General Assembly adopted before 1960, when the Application was made, are an almost unanimous expression of the conviction of States against the official policy of apartheid as practised in the mandated territory of South West Africa.

* * *

In conclusion I must repeat that—since I am in agreement with the findings of the Court in its 1950 Advisory Opinion and with the judgment rendered in 1962—I believe that some of the points of law raised in some of the main submissions of the Parties in the present procedures, have already been decided by the findings of the Court on such occasions and that they should have been confirmed if the majority of the Court today would have dealt with them.

There is no question in my mind that the Court's former interpretation of the relevant instruments, its conclusions in law and its reasoning, are beyond reproach from the point of view of a sound application of the legal principles involved therein.

It was held at that time that:

South West Africa is a territory under international mandate;
Respondent continues to have the international obligations stated in the Covenant and in the Mandate;
the Mandate is a treaty or convention in force within the meaning of Article 37 of the Statute;
Respondent is under an obligation to submit to the supervision of the General Assembly with regard to the exercise of the Mandate;
Respondent remains subject to the obligations to render to the United Nations annual reports and to transmit petitions from the inhabitants of the territory;
the dispute is one which is envisaged in Article 7 and cannot be settled by negotiation;
the Court has jurisdiction to adjudicate upon the merits of the dispute;
Respondent acting alone has not the competence to modify the international status of the territory of South West Africa; it needs the consent of the United Nations;
the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations towards the inhabitants of the territory.

* * *

The Court now considers that there are in the present case two fundamental questions which have an antecedent character:

(a) whether the Mandate still exists, and
(b) whether the Applicants have a legal right or interest in the subject-matter of the claims.

I said at the outset of this dissenting opinion that I cannot agree with the decision of the Court. I disagree also with its reasoning and its actual interpretation of the provisions of the Mandate.

It appears conclusive to me that in 1950 and 1962 the question of the legal interest of any Member of the League of Nations in the conduct of the Mandate was determined by the Court in holding that they had the right to invoke the compromissory clause against the Mandatory.

Several Members of the Court in 1950 and in 1962, in their separate opinions, then expressed their considered views on this question, as follows:

Judge Sir Arnold McNair said:

> "Although there is no longer any League to supervise the exercise 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." (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 158.)

Judge Read stated:

"Each Member of the League had a legal interest, *vis-à-vis* the Mandatory Power, in matters 'relating to the interpretation or the 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 (Article 7 of the Mandate Agreement). Further, each Member, at the time of dissolution, had substantive legal rights against the Union in respect of the Mandate."

". . . I regard as significant the survival of the rights and legal interests of the Members of the League; . . . the 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." (*Ibid.*, pp. 165, 166.)

Judge Bustamante said:

". . . Member States, as integral parts of the League itself, have possessed a direct legal interest in the protection of underdeveloped peoples. It is no doubt on the basis of these principles that the Mandate Agreement, in its Article 7, conferred upon Member States, in their individual capacity, the right to invoke the compromissory clause to require of the Mandatory a correct application of the Mandate." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 380.)

"These States are not 'third parties' outside the Mandate but jointly and severally responsible associates of the tutelary organization entrusted with ensuring the proper application of the Mandate." (*Ibid.*, p. 355.)

"Should a dispute arise between the League and a Mandatory, all the States Members would have the same legal interest as the League in the dispute, and would be affected to the same extent by violations of the agreements, one or more of those States having the right to appear before the Court to defend the common cause." (*Ibid.*, p. 361.)

> "Regard must be had to the fact that the wording of Article 7 of the Mandate is broad, clear and precise: it gives rise to no ambiguity, it refers to no exception . . . a restrictive interpretation which would include only the material and individual interests of a State Member must take a secondary indeed insignificant place." (*Ibid.*, p. 381.)

I agree with the aforementioned opinions; and it follows from what I have already said that—in my view—the Applicants have a legal right or interest in the subject-matter of the present claims.

(Signed) Luis PADILLA NERVO.
