

SOUTH WEST AFRICA

THE COURT'S JUDGMENT

TWO STUDIES

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**JUDGMENT OF THE INTERNATIONAL
COURT OF JUSTICE ON SOUTH WEST AFRICA (1966)**

Rosalyn Higgins

**THE INTERNATIONAL COURT AND
SOUTH WEST AFRICA:
THE IMPLICATIONS OF THE JUDGMENT**

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JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE ON SOUTH WEST AFRICA (1966)

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The Judgment of the International Court of Justice delivered on July 18, 1966 in the case which Ethiopia and Liberia, as original Members of the League of Nations, brought against South Africa in respect of the administration of its Mandate over South West Africa has evoked considerable comment and criticism throughout the world. The Judgment has had the effect of focussing attention on some of the problems relating to the effective application of International Law both in its substantive and in its procedural aspects. It has important implications for the standing of the International Court of Justice and for its future role in adjudicating upon disputes between member States of the United Nations.

In the last decade the membership of the United Nations has considerably increased and become much more broad-based by reason of the fact that several countries which had long been under colonial rule have now become independent. These newly independent countries naturally look to the United Nations and its competent organs for guidance and direction in their relations with other nations. It is therefore vital that a predictable and systematic international legal order should exist which will not only command the respect of member States but which will also encourage them to have recourse to the International Court of Justice to settle their disputes instead of leaving them to adopt their own devices – sometimes resulting in bloodshed.

In those areas of the world where the Universal Declaration of Human Rights is known and respected there is a growing realization that effective machinery for the enforcement of human rights on an international level is essential for the safeguarding of the Rule of Law. The question has been posed by lawyers throughout the world whether the recent Judgment of the International Court of Justice is not an indication of the inadequacy of the existing machinery for the enforcement of such rights.

In view of the importance of the Judgment, it is proposed to set out in this article in some detail the history of the case, the

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issues involved and some more important extracts from the Judgment of the Court and from Supporting and Dissenting Opinions. It is hoped to follow up this article with a further article on the Judgment.

After Germany was defeated in the First World War, German South West Africa, which had been a German colony, was conferred upon His Britannic Majesty by the principal Allied and Associated Powers under a Mandate to be exercised on His Majesty's behalf by the Government of the Union of South Africa¹. That Mandate was confirmed by the Council of the League of Nations on December 17, 1920. The "Sacred Trust", to use the words of the Mandate, laid by the League of Nations on the Union of South Africa imposed upon the mandatory the obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of German South West Africa.

Article 2 of the Mandate reads:

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such modifications as local conditions may require.

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.

It is convenient to note here that Mandates created by the League of Nations were of three categories, namely, A, B and C, depending largely upon the general level of advancement of the inhabitants of the territories in question, and the Mandate in respect of German South West Africa was a Mandate of the C category.

The Union of South Africa continued to govern South West Africa under the Mandate without interruption and after the Second World War the General Assembly of the United Nations, by a Resolution of December 1949, decided to obtain an Advisory Opinion from the International Court of Justice on the international status of South West Africa. The Resolution was duly transmitted to the Court which on July 11, 1950, gave the following Opinion:

that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920;

¹ On May 31, 1961 the Union became the Republic of South Africa.

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

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

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

To found the jurisdiction of the Court in the proceedings thus instituted, the Applications, having regard to Article 80, paragraph 1 of the Charter of the United Nations, relied on Articles 2 and 7 of the Mandate of December 17, 1920 for German South West Africa, Article 22 of the Covenant of the League of Nations and Article 37 of the Statute of the International Court of Justice.

Article 80, paragraph 1 of the Charter reads, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner whatsoever the rights of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

The relevant portion of Article 7 of the Mandate reads, (1) "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

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

The relevant portion of Article 22 of the Covenant reads, "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

Article 37 of the Statute reads, "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

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

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

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

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

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

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

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

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

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

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

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

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

The Republic of South Africa replied by raising certain preliminary objections. It submitted that the Governments of Ethiopia and Liberia had no *locus standi* in these proceedings, and that the Court had 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.

The Court by eight votes to seven found that it had jurisdiction to adjudicate upon the merits of the dispute and delivered judgment dismissing all four of these preliminary objections.

The Court as it was then constituted consisted of the following Members: President Winiarski (Poland); Vice-President Alfaro (Panama); Judges Basdevant (France), Badawi (United Arab Republic), Moreno Quintana (Argentina), Wellington Koo (China), Spiropoulos (Greece), Sir Percy Spender (Australia), Sir Gerald

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Fitzmaurice (United Kingdom), Koretsky (U.S.S.R.), Bustamante y Rivero (Peru), Jessup (U.S.A.), Morelli (Italy); Judges ad hoc Sir Louis Mbanefo (Nigeria), Van Wyk (South Africa).

The eight Judges who were of the view that the Court had jurisdiction to adjudicate upon merits of the dispute were: Vice-President Alfaro; Judges Badawi, Moreno Quintana, Wellington Koo, Koretsky, Bustamante y Rivero, Jessup; and Sir Louis Mbanefo, Judge ad hoc nominated by Ethiopia and Liberia.

The seven dissenting Judges were: President Winiarski; Judges Basdevant, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Morelli; and Van Wyk, Judge ad hoc, nominated by South Africa.

In dismissing the four preliminary objections, the majority of the Court found that:

- (a) The Applicants do have *locus standi*.
- (b) The Court has jurisdiction to hear and adjudicate upon the questions 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.
- (e) The Mandate is an international instrument of an institutional character.
- (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.
- (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.

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(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 of the Covenant), the only course left to defend the interests of the inhabitants would be to obtain adjudication by the Court.

(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.

(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 for ensuring protection.

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

(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.

(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 November 4, 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 that State.

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

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Thereafter the second phase of the case was opened. Pleadings were amended so as to bring them in line with the matters in issue at that stage and arguments on the merits were heard. During these proceedings the facts were abundantly canvassed, the law keenly debated, and witnesses and experts examined and cross-examined, all of which took many months. Finally, on July 18, 1966 the Court delivered its Judgment.

The Judgment of the Court was delivered by the President, Sir Percy Spender (Australia), supported by Judges Winiarski (Poland), Spiropoulos (Greece), Sir Gerald Fitzmaurice (United Kingdom), Morelli (Italy), Gros (France) and Van Wyk. The seven remaining Judges, namely Judges Wellington Koo (China), Koretsky (U.S.S.R.), Tanaka (Japan), Jessup (U.S.A.), Padilla Nervo (Mexico), Forster (Senegal) and Sir Louis Mbanefo, delivered dissenting opinions.

As the Court was equally divided, the President, following the procedure laid down in Article 55 of the Statute of the International Court of Justice, gave his additional casting vote in favour of the findings now embodied in the decision of the Court, the effect of which was that, although the Court had jurisdiction to entertain the petitions of the Applicants, the Applicants were not entitled to the declarations prayed for inasmuch as they had no legal right or interest in the observance of the Mandatory's obligations².

It will be seen that the composition of the International Court of Justice at the time it delivered its Judgment was somewhat different from the composition of the Court at the time it delivered its preliminary Judgment in 1962. This difference in composition assumes great importance in the study of this particular case in view of the fact that the preliminary Judgment of 1962 was an 8 to 7 majority Judgment and the final Judgment of 1966 was a 7 to 7 Judgment which was rendered an 8 to 7 majority Judgment on the casting vote of the President being given against Ethiopia and Liberia³. The fact that Judgments relating to matters of great international importance and concern could depend on the slightest majority of votes or even on a casting vote and could depend on changes in the composition of the Court during the pendency of the litigation arising from automatic retirement, resignation, in-

² Some of the Dissenting Opinions point out that the question as to whether the Applicants had a legal right or interest in the observance of the terms of the Mandate was not even raised by the Respondent in its final submissions made at the merits stage of the case and that the Court, by raising *ex mero motu* a question which was resolved in the Preliminary Judgment of 1962, had really reverted from the stage of the merits to the stage of jurisdiction. See observations of Judge Jessup (U.S.A.), at pp. 17 and 18 and of Judge Koretsky (U.S.S.R.), at p. 20 of this Article.

³ See observations of Judge Padilla Nervo in his Dissenting Opinion (p. 41 of this Article) where he calls the majority a technical or statutory one.

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capacity to act, death (as in the case of Judge Badawi of the United Arab Republic who participated in the preliminary Judgment but died before the hearing on the merits was concluded), or other factors, has given rise to grave concern in international legal circles as to how, whether by amendment of the Statute or otherwise, a greater element of certainty could be introduced into the administration of International Law by the principal judicial organ of the United Nations.

Some reference to the Statute of the International Court of Justice is necessary to explain why the composition of the Court when it heard and delivered the preliminary Judgment was somewhat different from its composition when it heard the arguments on the merits and delivered its final Judgment in July, 1966.

The Statute provides that the Court shall be composed of a body of independent Judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial officers or are jurisconsults of recognized competence in International Law. The Court consists of 15 members, no two of whom may be nationals of the same state. The members of the Court are elected by the General Assembly and by the Security Council from a list of persons nominated by national groups in accordance with certain provisions and procedures. Every elector is expected to bear in mind not only that persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

The members, which means the Judges of the Court, are elected for a period of nine years but may be re-elected. Five Judges retire every three years, so that one third of the membership of the Court is renewed every third year.

Whatever views one may hold on the Judgment of the Court, it would certainly have been more satisfying if, after all the arguments advanced and evidence led, the Court had made a pronouncement one way or the other on the substantial points in issue. As it stands, the Judgment has in effect declared in 1962 that the applicants had standing to institute the case and said in 1966, four years later, that they are not entitled to an answer. By indicating that individual nations may not seek redress for alleged breaches of a mandate without also showing a personal legal interest, the Court has ruled, in effect, that it will give no binding judgment on a mandatory's obligations, for, even when the United Nations itself goes to the Court on this matter, it can only ask for an advisory opinion which is not binding on the mandatory, as was the case in 1950, 1955 and 1956. How then can the conduct of the mandatory be effectively

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supervised? This is another important question which has been highlighted by the Judgment of the Court.

In order to bring out the opposing viewpoints and the reasoning underlying them, extracts from the Judgment of the Court of July 18, 1966 and from Dissenting Opinions are given below under the following headings:

- A – Applicants' Legal Right or Interest in the Subject-matter of the Claims – Is it a Preliminary Question already determined or a Question pertaining to Merits of the Case?
 - B – Features of the Mandate System and in particular the Mandate for South West Africa.
 - C – Do Applicants have a Legal Right or Interest to call for the due performance of the Mandate?
 - D – Has the Mandate Lapsed?
 - E – Is the Mandatory's Policy of Apartheid a Breach of the Provisions of the Mandate?
-
- A – Applicants' legal right or interest in the subject-matter of the claims – is it a preliminary question already determined or a question pertaining to the merits of the case?**

*Extracts from the Judgment of the Court*⁴

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

“Para. 4. . . the Court has studied the written pleadings and oral arguments of the Parties, and has also given consideration to the question of the order in which the various issues would fall to be dealt with. In this connection, there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings, – not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of

⁴ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 17-19.

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the case, of their legal right or interest regarding the subject matter of their claim, as set out in their final submissions.”

“Para. 5. Despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved. . . .”

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

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

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matter which, for reasons to be given later in another connection but equally applicable here, could not have been the subject of any final determination by a decision on a purely preliminary point of jurisdiction.”

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

*Extracts from the Supporting Judgment of Judge Morelli of Italy*⁵

“1. I wish to give the reasons why, in my view, the Court’s 1962 Judgment on the preliminary objections was no bar to the rejection of the claim on the merits on the ground of its not being based on substantive rights pertaining to the Applicants.

“It is my view that a judgment on preliminary objections, particularly a judgment which, like the judgment in question, dismisses the preliminary objections submitted by a party, is final and binding in the further proceedings. Its binding effect is however confined to the questions decided, and these can relate only to the admissibility of the claim or the jurisdiction of the Court.

“On the other hand, the Court’s reasoning in deciding a question submitted to it in the form of a preliminary objection is devoid of any binding effect. This limitation on the binding effect of the judgment applies to all the reasons for the decision, whatever their nature, whether of fact or of law, procedural or touching on the merits. Those touching on the merits of the case must be denied any binding effect for an additional reason; since, under Article 62, paragraph 3, of the Rules of Court, the filing of a preliminary objection suspends the proceedings on the merits, it is not possible for a question concerning the merits to be decided with final effect in a judgment on preliminary objections.

“2. The 1962 Judgment requires interpretation to elucidate

⁵ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 59-66.

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the exact scope of the decision on the question submitted to the Court in the third preliminary objection. In particular it is necessary to ascertain whether it was the Court's intention in dismissing that objection to hold the right to institute proceedings under Article 7 of the Mandate to be independent of any substantive right, in the sense that an applicant might avail himself of it without being required to assert the existence of a substantive right of his own. On this construction it would be sufficient for the applicant to rely on an obligation of the mandatory irrespective of whether the obligation were owed to the applicant or to some other person or persons . . .

"The decision by which the 1962 Judgment held, according to this interpretation, that the Members of the League of Nations had the right to seize the Court in respect of the Mandatory's obligations relating to the inhabitants of the Territory, irrespective of whether the applicant possessed any substantive right, would be a decision concerning the characterization of the action, conceived of as legitimately brought by the Applicants in the present case. By such a decision the Court would have settled a purely procedural question relating, on the one hand, to the Applicants' right to institute proceedings and, on the other hand, to the Court's jurisdiction. The decision would not have touched on the merits of the case at all. The Court would have said nothing about the existence of any substantive rights pertaining to the Applicants. The Court would simply have found that the existence of such rights was irrelevant not only to its jurisdiction, but also to the duty with which it had been entrusted. According to this interpretation that duty was to establish the existence, not of rights vested in the Applicants, but rather of obligations incumbent on the Mandatory, regardless of whether they were owed to the Applicants or to some other person or persons.

"3 . . . the 1962 Judgment confines itself to declaring that the dispute brought before the Court is a dispute within the meaning of Article 7 of the Mandate, without purporting to characterize the Applicants' action in any particular way.

"Far from excluding the necessity of a right pertaining to the Applicants for the claim to be able to be regarded as well-founded, the 1962 Judgment explicitly refers to the legal right or interest of the Members of the League of Nations in the observance by the Mandatory of its obligations. With reference to Article 7 of the Mandate, the Court said:

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. (*I.C.J. Reports 1962*, p. 343).

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"This passage seems to indicate some confusion between, on the one hand, the right to institute proceedings, the only right of Members of the League of Nations under Article 7, paragraph 2, of the Mandate, the provision to which the Court is referring, and, on the other hand, substantive rights, which appear to be correctly designated by the reference to a legal right or interest in the observance of its obligation by the person owing the obligation.

"However, whatever the criticism to which the Judgment may be open in connection with this confusion, it is clear that any possibility of taking the decision on the third objection to mean that it is not necessary to establish a substantive right pertaining to the Applicants is totally excluded by this very confusion. Once it is established that the Judgment did not draw any distinction between the right to institute proceedings and substantive rights, it becomes impossible to extract a diametrically opposite meaning from the Judgment, namely not only that the right to institute proceedings is quite separate from substantive rights, but also that it is so completely independent of any substantive right that the Court could uphold the claim as well-founded even if it were not based on a substantive right vested in the Applicants.

"4.

"Article 7 of the Mandate deals with the case of a dispute arising between the Mandatory and another Member of the League of Nations, and the need for the existence of a dispute to enable the Court to be seized is recognized in the Judgment. It is precisely in order to establish that this condition, laid down as a *sine qua non* by Article 7 of the Mandate, is fulfilled in this case that the Judgment begins by seeking to demonstrate the existence of a dispute between the Parties (*I.C.J. Reports 1962*, p. 328); then, in connection with the third preliminary objection, the Judgment finds that the dispute in question is a dispute within the meaning of Article 7 of the Mandate.

"... The need for there to be a dispute between the applicant and the Mandatory requires by implication that there should be a conflict of interest between the parties, whatever the nature of those interests. Having regard, on the other hand, to the legal character which must be possessed by the dispute, as appears from the reference in Article 7 to the legal rules contained in the provisions of the Mandate, it follows that the applicant must be able to rely on a right given to him as a means of protecting his interest.

"6.

"In paragraph 9 of the Application the Applicants state that, in the dispute which they maintain to exist between them and South Africa, they have continuously sought to assert and protect their "legal interest in the proper exercise of the Mandate" by disputing and protesting the violation by South Africa of its duties as Man-

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datory. The Applicants add that during the negotiations which they assert to have taken place, they exhibited at all times their "legal interest in the proper exercise of the Mandate" by disputing and protesting the violation by South Africa of its duties as Mandatory. The Applicants add that during the negotiations which they assert to have taken place, they exhibited at all times their "legal interest in the proper exercise of the Mandate". They conclude by declaring that they instituted the proceedings for the very purpose of protecting their legal interest in the proper exercise of the Mandate.

"It is thus the legal interest, or right, of the Applicants in the proper exercise of the Mandate which constitutes the *cause petendi* of the claim. It was thus in the claim as characterized by such a *causa petendi* that the Court had to give its decision. Nothing to the contrary is to be found in the 1962 Judgment.

"7. An analysis of that part of the 1962 Judgment which relates to the third preliminary objection leads to the conclusion that the decision represented by the dismissal of that preliminary objection amounts solely to a finding that the dispute submitted to the Court, held by the Judgment to exist, was a dispute within the meaning of Article 7 of the Mandate. This decision does not in any way concern the characterization of the action provided for by that Article and utilized by the Applicants. In particular this decision does not give such action the quite unusual characterization according to which it could be utilized without the need for the applicant to rely on a substantive right of his own.

"It follows that in the merits phase of the proceedings the Court was completely unfettered with regard to the question of whether it was necessary for the Applicants to have a substantive right in order that the claim might be upheld . . .

"8.

"9.

"It must however be observed that as between the various questions all of which concern the merits, there is no strict order of logic; the order to be followed in any particular case in dealing with the various questions of merits is dictated rather by reasons of what might be called economy, which counsel the use of the simplest means of reaching the decision. It was thus perfectly open to the Court, in this case, to begin by examining the question of standing in relation to any rights which might exist on the assumption that South Africa still owes certain obligations under the Mandate."

The following extracts from the Dissenting Opinions of Judge Jessup (U.S.A.) and Judge Koretsky (U.S.S.R.)⁶ represent a good summary of the contrary views held by the seven dissenting Judges

⁶ The Dissenting Opinions of Judges Jessup and Koretsky were not set out in numbered paragraphs.

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on the point whether the Court could at that stage of the proceedings go into the question as to whether the Applicants had any legal right or interest in the subject-matter of their claims.

*Judge Jessup (dissenting):*⁷

“Having very great respect for the Court, it is for me a matter of profound regret to find it necessary to record the fact that I consider the Judgment which the Court has just rendered by the casting vote of the President in the South West Africa Case, completely unfounded in law. In my opinion, the Court is not legally justified in stopping at the threshold of the case, avoiding a decision on the fundamental question whether the policy and practice of apartheid in the mandated Territory of South West Africa is compatible with the discharge of the “sacred trust” confided to the Republic of South Africa as Mandatory.

“Since it is my finding that the Court has jurisdiction, that the Applicants, Ethiopia and Liberia, have standing to press their claims in this Court and to recover judgment, I consider it my judicial duty to examine the legal issues in this case which has been before the Court for six years and on the preliminary phases of which the Court passed judgment in 1962. This full examination is the more necessary because I dissent not only from the legal reasoning and factual interpretations in the Court’s Judgment but also from its entire disposition of the case. . . .

“The Judgment bases itself on a reason not advanced in the final submissions of the Respondent – namely on Applicants’ lack of “any legal right or interest appertaining to them in the subject-matter of the present claims”. This is said to be a question of the “merits” of the claim and it is therefore in connection with the “merits” that the nature of the requisite legal right or interest must be analysed.

“In its Judgment of 21 December 1962 the Court decided that “it has jurisdiction to adjudicate upon the merits of the dispute”.

“In reaching that conclusion the Court had to reject the four preliminary objections filed by the Respondent. It did reject the four objections and thereby substantially held:

1. that the Mandate for South West Africa is a “treaty or convention in force” within the meaning of Article 37 of the Statute of the Court;
2. that despite the dissolution of the League, Ethiopia and Liberia had *locus standi* under Article 7, paragraph 2, of the Mandate, to invoke the jurisdiction of the Court;

⁷ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 325-329.

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3. that the dispute between the Applicants and the Respondent was a "dispute" as envisaged in Article 7, paragraph 2, of the Mandate; and
4. that the prolonged exchanges of differing views in the General Assembly of the United Nations constituted a "negotiation" within the meaning of Article 7, paragraph 2, of the Mandate and revealed that the dispute was one which could not be settled by negotiation within the meaning of that same provision of the Mandate.

"After the 1962 Judgment, the Respondent filed its Counter-Memorial in ten volumes plus one supplementary volume. The Applicants in turn filed their Reply and the Respondent filed its Rejoinder in two volumes supplemented by other materials, including the so-called Odendaal Report of 557 printed foolscap pages.

"Beginning on March 15, 1965, the Court devoted 99 public sessions to oral hearings which included the arguments of Agents and Counsel for both parties and the testimony of 14 witnesses.

"The voluminous record was studied by the Court and its deliberations were held over a period of some six months.

"The Court now in effect sweeps away this record of 16 years and, *on a theory not advanced by the Respondent in its final submissions November 5, 1965*, decides that the claim must be rejected on the ground that the Applicants have no legal right or interest.

"Paragraph 2 of Article 7 of the Mandate gave a member of the League the right to submit to the Court a dispute relating to the interpretation of the provisions of the Mandate if the dispute cannot be settled by negotiation. As I shall show in more detail later, the Court in 1962 decided that the Applicants qualify in the category "Member of the League"; this is *res judicata* and the Court's Judgment of today does not purport to reverse that finding. The Court in 1962 equally held that the present case involves a dispute which cannot be settled by negotiation; this double finding has the same weight and today's decision does not purport to reverse that finding. I do not understand that it is denied that the dispute refers to the interpretation of provisions of the Mandate. I do not see how this clear picture can be clouded by describing the claims as demands for the performance or enforcement of obligations owed by the Respondent to the Applicants. The submissions may indeed involve that element also, as will be noted, but this element does not exclude the concurrent requests for interpretation of the Mandate.

"Whether any further right, title or interest is requisite to support Applicants' requests in this case for orders by the Court directing Respondent to desist from certain conduct alleged to be violative of its legal obligations as Mandatory, may well be a separate question, but the Judgment of the Court denies them even the declaratory judgment. . . .

*Judge Koretsky (dissenting):*⁸

"I can in no way concur in the present Judgment mainly because the Court reverts in essence to its Judgment of 21 December 1962 on the same cases and in fact revises it even without observing Article 61 of the Statute and without the procedure envisaged in Article 78 of the Rules of Court.

"The Court has said in the operative part of its Judgment 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 . . .".

"But the question of the Applicants' "legal right or interest" (referred to in short as their "interest") in their claims as a ground for instituting proceedings against the Respondent as Mandatory for South West Africa was decided already in 1962 in the first phase (the jurisdictional phase) of these cases.

"At that time, the Respondent, asserting in its third preliminary objection that the conflict between the parties "is by reason of its nature and content not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa", added, "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" (Italics added). The adjective "material" (interests) was evidently used not in its narrow sense – as a property interest.

"In dismissing the preliminary objection of the Respondent the Court then said that "the manifest scope and purport of the provisions of this Article (i.e., Article 7) 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". (Italics added.) (p. 343.) And a little later the Court said: "Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the mandated territory are not less important." (p. 344).

"So the question of the Applicants' interests in their claims was decided as, one might say, it should have been decided, by the Court in 1962. The question of an applicant's "interest" (as a question of a "*qualité*") even in national-law systems is considered as a jurisdictional question. For example, "*le défaut d'intérêt*" of an applicant is considered in the French law system as a ground for "*fin-de-non-recevoir de procédure*".

"The Rules of Court, and the practice of the Court, do not

⁸ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 239-241.

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recognize any direct line of demarcation between questions of the merits and those of jurisdiction. The circumstances of the case and the formulation of the submissions of the parties are of guiding if not decisive significance.

"The Respondent, as noted above, raised the question of the Applicants' interests. The Court decided this question at that time. It did not consider it necessary to join it to the merits as the character of the Applicants' interests in the subject-matter of their claims was evident. Both Parties dealt with this question in a sufficiently complete manner. The Applicants, as will be noted later, did not seek anything for themselves; they asserted only that they have a "legal interest to seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated". To join the question of the Applicants' "interests" in their claims to the merits would not "reveal" anything now, as became evident at this stage of the cases. And it is worthy of note that in the dissenting opinion of President Winiarski, in the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice and in the dissenting opinion of Judge *ad hoc* Van Wyk, the question of the Applicants' interests was considered on a jurisdictional plane.

"The Respondent did not raise this question in its final submission at this stage of the merits. The Court itself has now raised the question which was resolved in 1962 and has thereby reverted from the stage of the merits to the stage of jurisdiction. And thus the "door" to the Court which was opened in 1962 to decide the dispute (as the function of the Court demands (Article 38 of the Statute)), the decisions of which would have been of vital importance for the peoples of South West Africa and to peoples of other countries where an official policy of racial discrimination still exists, was locked by the Court with the same key which had opened it in 1962.

"Has the 1962 Judgment of the Court a binding force for the Court itself?

"The Judgment has not only a binding force between the parties (Article 59 of the Statute), it is final (Article 60 of the Statute). Being final, it is – one may say – final for the Court itself unless revised by the Court under the conditions and in accordance with the procedure prescribed in Article 61 of the Statute and Article 78 of the Rules of Court.

"In discussing the meaning of the principle of *res judicata*, and its applicability in international judicial practice, its significance is often limited by the statement that a given judgment could not be considered as binding upon other States or in other disputes. One may sometimes easily fail to take into consideration the fact that *res judicata* has been said to be not only *pro obligatione habetur*,

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but *pro veritate* as well. And it cannot be said that what today was for the Court a *veritas*, will tomorrow be a *non-veritas*. A decision binds not only the parties to a given case, but the Court itself. One cannot forget that the principle of immutability, of the consistency of final judicial decisions, which is so important for national courts, is still more important for international courts. The practice of the Permanent Court and of this Court shows the great attention they pay to former judgments, their reasons and opinions. Consideration must be given even to the question whether an advisory opinion of the Court, which is not binding for the body which requested it, is binding for the Court itself not only *vi rationis* but *ratione vi* as well.

“Could it possibly be considered that in a judgment only its operative part but not the reasons for it has a binding force? It could be said that the operative part of a judgment seldom contains points of law. Moreover, the reasons, motives, grounds, for a given judgment may be said to be the “reasons part” of the judgment. The two parts of a judgment – the operative part and the reasons – do not “stand apart” one from another. Each of them is a constituent part of the judgment in its entirety. It will be recalled that Article 56 of the Statute says:

“The judgment shall state *the reasons on which it is based*” (italics added).

“These words are evidence that the reasons have a binding force as an obligatory part of a judgment and, at the same time, they determine the *character* of reasons which should have a binding force. They are reasons which substantiate the operative conclusion directly (“on which it is based”). They have sometimes been called “*consideranda*”. These are reasons which play a role as the grounds of a given decision of the Court – role such that if these grounds were changed or altered in such a way that this decision in its operative part would be left without grounds on which it was based, the decision would fall to the ground like a building which has lost its foundation.”

B – Features of the Mandate System and in particular of the Mandate for South West Africa

*Extracts from the Judgment of the Court*⁹

10. “The mandates system, as is well known, was formally instituted by Article 22 of the Covenant of the League of Nations. As there indicated, there were to be three categories of mandates,

⁹ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 20 and 21.

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

11. "These instruments, whatever the difference between certain of their terms, had various features in common as regards their structure. For present purposes, their substantive provisions may be regarded as falling into two main categories. On the one hand, and of course as the principal element of each instrument, there were the articles defining the mandatory's powers, and its obligations in respect of the inhabitants of the territory and towards the League and its organs. These provisions, relating to the carrying out of the mandates as mandates, will hereinafter be referred to as "conduct of the mandate", or simply "conduct" provisions. On the other hand, there were articles conferring in different degrees, according to the particular mandate or category of mandate, certain rights relative to the mandated territory, directly upon the members of the League as individual States, or in favour of their nationals. Many of these rights were of the same kind as are to be found in certain provisions of ordinary treaties of commerce, establishment and navigation concluded between States. Rights of this kind will hereinafter be referred to as "special interests" rights, embodied in the "special interests" provisions of the mandates. As regards the 'A' and 'B' mandates (particularly the latter) these rights were numerous and figured prominently – a fact which, as will be seen later, is significant for the case of the 'C' mandates also, even though, in the latter case, they were confined to provisions for freedom for missionaries ("nationals of any State Member of the League of Nations") to "enter into, travel and reside in the territory for the purpose of prosecuting their calling" – (Mandate for South West Africa, Article 5). In the present case, the dispute between the Parties relates exclusively to the former of these two categories of provisions, and not to the latter.

12. "The broad distinction just noticed was a genuine, indeed an obvious one. Even if it may be the case that certain provisions of some of the mandates (such as for instance the "open door" provisions of the 'A' and 'B' mandates) can be regarded as having

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a double aspect, this does not affect the validity or relevance of the distinction. Such provisions would, in their "conduct of the mandate" aspect, fall under that head; and in their aspect of affording commercial opportunities for members of the League and their nationals, they would come under the head of "special interests" clauses. It is natural that commercial provisions of this kind could redound to the benefit of a mandated territory and its inhabitants in so far as the use made of them by States members of the League had the effect of promoting the economic or industrial development of the territory. In that sense and to that extent these provisions could no doubt contribute to furthering the aims of the mandate; and their due implementation by the mandatories was in consequence a matter of concern to the League and its appropriate organs dealing with mandates questions. But this was incidental, and was never their primary object. Their primary object was to benefit the individual members of the League and their nationals. Any action or intervention on the part of member States in this regard would be for that purpose – not in furtherance of the mandate as such.

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

Judge Tanaka of Japan in his dissenting opinion¹⁰ makes the following observations concerning the legal and social nature and characteristics of the mandate system:

"The mandates system, established by the Covenant of the League of Nations, can be considered as an original method of administering certain underdeveloped overseas possessions which

¹⁰ South West Africa, Second Phase, Judgment, International Court of Justice 1966, pp. 264-268. The dissenting opinion of Judge Tanaka was also not set out in numbered paragraphs.

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formerly belonged to States in the First World War. "The essential principles of the mandates system" says the 1962 Judgment in the *South West Africa* cases –

consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime 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. (*I.C.J. Reports* 1962, p. 329)

"The idea that it belongs to the noble obligation of conquering powers to treat indigenous peoples of conquered territories and to promote their well-being has existed for many hundred years, at least since the time of Francisco de Vitoria. But we had to wait for the Treaty of Peace with Germany, signed at Versailles in 1919, and the creation of the League of Nations for this idea to take the concrete form of an international institution, namely the mandates system, and to be realized by a large and complicated machinery of implementation. After the dissolution of the League the same idea and principles have been continued in the "International Trusteeship System" in the Charter of the United Nations.

"The above-mentioned essential principles of the mandates system are important to decide the nature and characteristics of the Mandate as a legal institution.

"Here, we are not going to construct a more-or-less perfect definition or concept of the Mandate. We must be satisfied to limit ourselves to the points of which clarification would be necessary or useful to decide the issue now in question.

"The mandates system is from the viewpoint of its objectives, as well as of its structure, highly complicated. Since its objectives are the promotion of the well-being and social progress of the inhabitants of certain territories as a sacred trust of civilization, its content and function are intimately related to almost all branches of the social and cultural aspects of human life. Politics, law, morality, religion, education, strategy, economy and history are intermingled with one another in inseparable complexity. From the point of view of the Court the question is how to draw the line of demarcation between what is law and what is extra-legal matter, particularly politics which must be kept outside of justiciability (we intend to deal with this question below).

"The mandates system is from the structural viewpoint very complicated. The parties to the Mandate as a treaty or as a

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are on the one side the League of Nations and on the other the Mandatory – in the present cases the Respondent. The latter accepted the Mandate in respect of the Territory of South West Africa “on behalf of the League of Nations”. Besides these parties, there are persons who are connected with the Mandate in some way, particularly who collaborate in the establishment or the proper functioning of this system, such as the Principal Allied and Associated Powers, to which these territories had been ceded by the Peace Treaty, Members of the League, and those who are interested as beneficiaries, namely the inhabitants of the mandated territories. Whether or not, and to what degree the United Nations and its Members can be considered as concerned, belongs to the matters which fall to be decided by the Court.

“The Mandate, constituting an aggregate of the said diverse personal elements, as we have seen above, presents itself as a complex of many kinds of interests. The League and Mandatory, as parties to the Mandate, have a common interest in the proper performance of the provisions of the Mandate. The inhabitants of the mandated territories possess, as beneficiaries, a most vital interest in the performance of the Mandate.

“The Mandatory does not exercise the rights of tutelage of peoples entrusted to it on behalf of itself, but on behalf of the League. The realization of the “sacred trust of civilization” is an interest of a public nature. The League is to serve as the existing political organ of the international community by guarding this kind of public interest.

“The Mandate, being of the said personal and real structure, possesses in many points characteristics which distinguish it from other kinds of treaties.

“Firstly, the Mandate is intended to establish between parties a certain legal relationship of which the aims and purposes are different from those we find in the case of commercial treaties in which two different kinds of operations stand reciprocally against each other and which are extinguished with simultaneous performance by the parties. They are a realization of identical aims, which is a “sacred trust of civilization”. In this sense, the Mandate has characteristics similar to law-making treaties, defined by Oppenheim as those “concluded for the purpose of establishing new rules for the law of nations”. (Quincy Wright, *Mandates under the League of Nations*, 1930, p. 357.)

“What is intended by the parties of the mandate agreement as a “sacred trust of civilization” is the promotion of the material and moral well-being and social progress of the inhabitants of the territory who are “not yet able to stand by themselves under the

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"The Mandate is a legal method or machinery for achieving the above-mentioned humanitarian purposes. Therefore, between the two parties to the mandate agreement there does not exist a fundamental conflict of interests or "exchange of balancing services" such as we recognize in synallagmatic contracts (cf. Judge Bustamante's separate opinion on *South West Africa* cases, *I.C.J. Reports 1962*, pp. 357 and 359) or contracts of the type *do-ut-des*. The mandate agreement can be characterized rather as a union of two unilateral declarations, the one by the League, the other by the Mandatory, a phenomenon which we find in cases of creation of partnerships or corporations. Incidentally, this conclusion, in our view, does not prevent the construction of the mandate agreement as a kind of treaty or convention.

"This characteristic is clearly manifest in the fact that the League can be considered as a collaborator of the Mandatory by its power of supervision and an adviser in the performance of the obligations of the latter.

".....
"Secondly, the long-term nature of the mandate agreement is what characterizes it from the other contracts. This character derives from the nature of the purposes of the mandates system, namely the promotion of the material and moral well-being and social progress of the mandated territories, which cannot be realized instantaneously or within a foreseeable space of time.

"Thirdly, the mandate agreement requires from the Mandatory a strong sense of moral conscience in fulfilling its responsibility as is required in the case of guardianship, tutelage and trust. "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. . ." The obligations incumbent upon the Mandatory are of an ethical nature, therefore unlimited. The mandate agreement is of the nature of a bona fide contract. For its performance the utmost wisdom and delicacy are required.

"From what is indicated above, it follows that, although the Mandatory is conferred "full power of administration and legislation over the territory", the weight of the mandates system shall be put on the obligations of the Mandatory rather than on its rights.

"The 1962 Judgment, clarifying this characteristic of the mandates system, declares as follows:

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 (*I.C.J. Reports 1962*, p. 329).

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“Judge Bustamante emphasized very appropriately (*ibid.*, p. 357) the more important aspect of responsibility rather than of rights regarding the function of the Mandatory. The Mandatory must exercise its power only for the purpose of realizing the well-being and progress of the inhabitants of the territory and not for the purpose of serving its egoistic ends. As Professor Quincy Wright puts it, “it has been recognized that the conception of mandates in the Covenant requires that the Mandatory receive no direct profit from its administration of the territory”. This is called the “principle of gratuitous administration” (Quincy Wright, *op cit.*, pp. 452-453).

“From the nature and characteristics of the mandates system and the mandate agreement, indicated above, we can conclude that, although the existence of contractual elements in the Mandate cannot be denied, the institutional elements predominate over the former. We cannot explain all the contents and functions of the mandates system from the contractual, namely the individualistic, and subjective viewpoint, but we are required to consider them from the institutional, namely collectivistic, and objective viewpoint also. This latter viewpoint is, according to Lord McNair, that of –

... certain rights of possession and government (administrative and legislative) which are valid *in rem – erga omnes*, that is against the whole world, or at any rate against every State which was a Member of the League or in any other way recognized the Mandate. (*I.C.J. Reports 1950*, p. 156).

“From the purely contractual and individualistic viewpoint the Mandate would be a personal relationship between the two parties, the existence of which depends upon the continuance of the same parties. For instance, a mandate contract in private law lapses by reason of the death of the mandator. But the international mandate does not remain, as we have seen above, purely a relationship, but an objective institution, in which several kinds of interests and values are incorporated and which maintains independent existence against third parties. The Mandate, as an institution, being deprived of personal character, must be placed outside of the free disposal of the original parties, because its content includes a humanitarian value, namely the promotion of the material and moral well-being of the inhabitants of the territories. Therefore, there shall exist a certain limitation, derived from the characteristics of the Mandate, upon the possibility of modification for which the consent of the Council of the League of Nations is required (Article 7, paragraph 1, of the Mandate).”

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C – Do Applicants have a Legal Right or Interest to call for due performance of the Mandate?

*Extracts from the Judgment of the Court:*¹¹

14. "... the question which has to be decided is whether, according to the scheme of the mandates and of the mandates system as a whole, any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually and each in its own separate right to call for the carrying out of the mandates as regards their "conduct" clauses; – or whether this function must, rather, be regarded as having appertained exclusively to the League itself, and not to each and every member State, separately and independently. In other words, the question is whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates.

15. "If the answer to be given to this question should have the effect that the Applicants cannot be regarded as possessing the legal right or interest claimed, it would follow that even if the various allegations of contraventions of the Mandate for South West Africa on the part of the Respondent were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they ask the Court to make. . . .

16. "It is in their capacity as former members of the League of Nations that the Applicants appear before the Court; and the rights they claim are those that the members of the League are said to have been invested with in the time of the League. Accordingly, in order to determine what the rights and obligations of the Parties relative to the Mandate were and are (supposing it still to be in force, but without prejudice to that question); and in particular whether (as regards the Applicants) these include any right individually to call for the due execution of the "conduct" provisions, and (for the Respondent) an obligation to be answerable to the Applicants in respect of its administration of the Mandate, the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been

¹¹ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 22-30.

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formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant. Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at. This view is supported by a previous finding of the Court (*Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, at p. 189) the effect of which is that the meaning of a juridical notion in a historical context must be sought by reference to the way in which that notion was understood in that context.

18. "The enquiry must pay no less attention to the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system was organized, and which inevitably determined how this system was to operate, – by what methods, – through what channels, – and by means of what recourses. One fundamental element of this juridical character and structure, which in a sense governed everything else, was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat". If the action of the League as a whole was thus governed, it followed naturally that the individual member States could not themselves act differently relative to League matters, unless it was otherwise specially so provided by some article of the Covenant.

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

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

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

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

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

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

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

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

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

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

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

31. "Another circumstance calling for notice is that, as mentioned earlier, the Mandate contained a clause - paragraph 1 of Article 7 (and similarly in the other mandates) - providing that the consent of the Council of the League was required for any modification of the terms of the Mandate; but it was not stated that the consent of individual members of the League was additionally required. . . .

32. "The real position of the individual members of the League relative to the various instruments of mandate was a different one. They were not parties to them; but they were, to a limited extent, and in certain respects only, in the position of deriving rights from these instruments. Not being parties to the instruments of mandate, they could draw from them only such rights as these unequivocally conferred, directly or by a clearly necessary implication. The existence of such rights could not be presumed or merely inferred or postulated. But in Article 22 of the League Covenant, only the mandatories are mentioned in connection with the carrying out of the mandates in respect of the inhabitants of the mandated territories and as regards the League organs. . . .

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sions of paragraph 8 (the "if not previously agreed upon" clause) the only mention of the members of the League in Article 22 is in quite another context, namely at the end of paragraph 5, where it is provided that the mandatories shall "also secure equal opportunities for the trade and commerce of other Members of the League". It is the same in the instruments of mandate. Apart from the jurisdictional clause, which will be considered later, mention of the members of the League is made only in the "special interests" provisions of these instruments. It is in respect of these interests alone that any direct link is established between the mandatories and the members of the League individually. In the case of the "conduct" provisions, mention is made only of the mandatory and, where required, of the appropriate organ of the League. The link in respect of these provisions is with the League or League organs alone.

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

34. "To put this conclusion in another way, the position was that under the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League - in particular to its Council - and were not additionally and separately responsible

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latter had been given a legal right or interest on an individual "State" basis, this would have meant that each member of the League, independently of the Council or other competent League organ, could have addressed itself directly to every mandatory, for the purpose of calling for explanations or justifications of its administration, and generally to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose.

35. "Clearly no such right existed under the mandates system as contemplated by any of the relevant instruments. It would have involved a position of accountability by the mandatories to each and every member of the League separately, for otherwise there would have been nothing additional to the normal faculty of participating in the collective work of the League respecting mandates. The existence of such an additional right could not however be reconciled with the way in which the obligation of the mandatories, both under Article 22 of the League Covenant, and (in the case of South West Africa) Article 6 of the Instrument of Mandate, was limited to reporting to the League Council, and to its satisfaction alone. Such a situation would have been particularly unimaginable in relation to a system which, within certain limits, allowed the mandatories to determine for themselves by what means they would carry out their mandates: and *a fortiori* would this have been so in the case of a 'C' mandate, having regard to the special power of administration as "an integral portion of its own territory" which, as already noted, was conferred upon the mandatory respecting this category of mandate.

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

Extracts from some of the Dissenting Opinions on the Question of the Applicants' Legal Rights or Interest

*Vice-President Wellington Koo:*¹²

¹² South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 216-217, 219-220, 222-223 and 228-229. The Dissenting Opinion of Vice-President Wellington Koo as well as those of Judges Padilla Nervo (see pp. 40-42 and pp. 47-51 below) and Isaac Forster (see pp. 42-45 and 46-47 below) were not set out in numbered paragraphs.

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"I regret to be unable to concur in the Judgment of the Court which "finds that the Applicants cannot be considered to have established any substantive right or legal interest appertaining to them in the subject-matter of the present claims". Nor am I able to agree with the reasons upon which it is based. . . .

.....
"The principal question considered in the present Judgment is, again, whether the Applicants in the instant cases have a legal right or interest in the subject-matter of their claims. The Judgment finds that the Applicants have no such right or interest in the performance provisions of the Mandate for South West Africa. It seems to me that the main arguments in support of this finding are largely derived from the concepts of guardianship or tutelle in municipal law with its restricted notions of contract, parties and interests.

.....
". . . the legal right or interest of the League Members individually as well as collectively through the Assembly of the League in the observance of the mandates by the mandatory originated with and was inherent in the mandates system, as has been demonstrated above, and an adjudication clause was inserted in each mandate not to confer this right or interest, which is already necessarily implied in Article 22 of the Covenant and in the mandate agreement, but to bear testimony to its possession by the League Members and to enable them, if need be, to invoke in the last resort, judicial protection of the sacred trust.

"That the above finding of the Applicants' possession of a legal right or interest in the performance of the Mandate for South West Africa is correct is also borne out by the provision and language of Article 7(2)¹³, the text of which has already been cited earlier.

"This right or interest is not, as affirmed in effect by the Judgment, limited to the material or national interests of the individual League Members as provided for in Article 5 of the Mandate for South West Africa¹⁴ relating to freedom of missionaries "to enter into, travel and reside in the territory for the purpose of prosecuting their calling". The broad, plain and comprehensive language of the provision implies that the content and scope of the legal right or interest of the Members of the League of Nations is co-extensive with

¹³ See pages 3 and 4 above.

¹⁴ Article 5 of the Mandate: "Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling."

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the obligations of the Mandatory under the Mandate; it is not restricted to the content of the said Article 5.

"If it were to be interpreted as so limited, such interpretation would obviously be incompatible with the all-embracing term "the provisions of the Mandate". If it had been intended by the authors of the instrument to be so restricted in meaning and content, it would have been a simple thing to mention "Article 5" instead of the actual term "the provisions of the Mandate" – as stated in the compromissory clause. There is a Chinese proverb put in the form of a question: why write a long and big essay on such a small subject? The alleged limited purport and scope of the terms employed in Article 7(2), such as the term "any dispute" or the "provisions of the Mandate", if the allegation were well-founded, would certainly make the actual language of the compromissory clause appear to be extravagant. And yet we know as a fact that the draft 'B' and 'C' mandates, both containing a similarly worded compromissory clause, were considered by several bodies of the Paris Peace Conference composed of eminent statesmen over a period of several months, such as the Milner Commission and the Council of Heads of Delegations in Paris and later by the Council of the League of Nations – all deeply concerned in the matter of the mandates and the proposed mandates system. In fact, within the membership of these bodies, most, if not all, of the principal mandatory Powers were represented.

.....

"It will also be recalled that the possession of this legal right or interest by the Applicants is the basis of the Court's finding in the 1962 Judgment that the dispute is one envisaged within the purport of Article 7, to establish its jurisdiction. After recalling the rule of construction based upon the natural and ordinary meaning of a provision and referring to 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 or the provisions of the Mandate", the Court said:

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. (*I.C.J. Reports 1962*, p. 343).

"In fact earlier the Advisory Opinion of 1950 by emphasizing

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simultaneously "the essentially international character of the functions which had been entrusted to the Union of South Africa" and the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate, undoubtedly implied the existence of a legal right or interest of the League Members in the performance of the Mandate. Even the two judges who alone dissented with the Opinion of 1950 on the question of transfer of the League's supervisory functions to the General Assembly of the United Nations, affirmed the possession of a legal interest by the members of the League of Nations in the observance of the obligations of the Mandatory. Thus Sir Arnold (now Lord) McNair stated:

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. (*I.C.J. Reports 1950*, p. 158).

"Judge Read, in his separate opinion appended to the same Advisory Opinion of 1950, put the matter of the legal rights of the members of the League even more strongly. He stated:

As a result of the foregoing considerations, it is possible to summarize the position, as regards the international status of South West Africa and the international obligations of the Union arising therefrom, after the termination of the existence of the League:

First: the Mandate survived, together with all of the essential and substantive obligations of the Union.

Second: the *legal rights and interests* of the Members of the League, in respect of the Mandate, survived with one important exception - in the case of Members that did not become parties to the Statute of this Court, their right to implead the Union before the Permanent Court lapsed. (*Italics added.*) (*Ibid.*, p. 169.)

....

"The fact that only one case was brought to the Permanent Court of International Justice by any Member of the League of Nations during the 25 years of its existence under an adjudication clause similar to Article 7 of the Mandate for South West Africa (Article 26 of the Palestine Mandate) in respect of alleged injury to the material interests of a national of the Applicant and that no recourse was

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ever made to the Court to invoke its protection and ensure due observance by the mandatory Power of its substantive obligations under a given mandate towards the inhabitants of the mandated territory does not necessarily prove that individual League Members had no legal right or interest in such observance. As stated by Judge Read in his separate opinion in 1950, when referring to the obligation of the Union of South Africa to submit to the compulsory jurisdiction of this Court in the case of a dispute relating to the interpretation or the application of the provisions of the Mandate under the provisions of Article 7 of the mandate agreement and Article 37 of the Statute, reinforced by Article 94 of the Charter:

The importance of these provisions cannot be measured by the frequency of their exercise. The very existence of a judicial tribunal, clothed with compulsory jurisdiction, is enough to ensure respect for legal obligations. (*I.C.J. Reports 1950*, p. 169.)

“The legal right or interest of the League Members in the performance of the mandate obligations by the Mandatory has always existed though it might appear to be latent. For so long as the conflict of views on a given subject-matter between the Council of the League of Nations and the Mandatory, either as an *ad hoc* or as a regular member of it, continued to be under discussion and the possibility of reaching an eventual agreement remained, there was no occasion for any member State to resort to judicial action under Article 7, paragraph 2, of the Mandate. For example, the objection of the Mandates Commission to the statement in the preamble of a Frontier Agreement concluded between the Union and Portugal relating to the boundary between Portuguese Angola and the mandated territory that “the Government of the Union of South Africa, subject to the terms of the Mandate, *possesses sovereignty* over the Territory of South West Africa” was raised at its meetings every year in 1926, 1927, 1929 and 1930. After the Council adopted resolutions on the basis of the Commission’s reports and no word of acceptance came from the Mandatory Power, the Commission continued to press for a reply. Finally, “the Union of South Africa, by a letter of 16 April 1930, stated its acceptance of the definition of the powers of the Mandatory contained in the Reports of the Council”. (*I.C.J. Pleadings*, 1950, p. 198.) However, if the Mandatory had persisted in its own view on this question to the end even after the Council should have obtained an advisory opinion of the Court confirming the interpretation by the Council as being in complete conformity with the Covenant and the mandate agreement, there was no certainty that no member State of the League of Nations, in the exercise of its substantive right or legal interest in the performance of this Mandate, would have brought an action in the Permanent Court to obtain a binding decision on the legal

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question involved in the dispute with the Mandatory. The infrequency of exercising this legal right or interest does not in any sense prove its non-existence.”

*Judge Jessup:*¹⁵

“Although the Judgment of the Court recognizes that some of the Applicants’ submissions request “pronouncements and declarations” and that the first and second submissions are included in that class, the Judgment says –

... the question which has to be decided is whether ... any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually, and each in its own separate right to call for the carrying out of the mandates as regards their conduct clauses.

“But the question also is whether the same Applicants individually had a right to ask the Court to interpret the Mandate so that – for example – those States might then determine whether to proceed through political channels to induce the Mandatory to act in a certain way. Such an inter-relation of the function of the Permanent Court of International Justice and of the political organs of the League of Nations was frequently illustrated in connection with the peace settlements after World War I. Thus, under Article 11 of the Covenant, it was “declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international peace or the good understanding between nations upon which peace depends”. Under Article 35 (1) of the Charter of the United Nations, Members have a comparable right if there is a “situation which might lead to international friction”. Assume a Member of the League (or of the United Nations) considered that the practice of apartheid in the mandated territory of South West Africa was in violation of the Mandate and that it might disturb “good understanding between nations” – as indeed it has – or that it might “lead to international friction” – which indeed it has. Assume that such hypothetical member, before taking the matter to the Assembly (or General Assembly) wished to secure an authoritative pronouncement from the International Court as to whether its interpretation of the mandate was correct. Surely it would have a legal interest cognizable under paragraph 2 of Article 7 of the Mandate. Even a potential intention to act under Article 11 of the Covenant (or Article 35 of the Charter) would justify an application to the

¹⁵ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 423-425.

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Court and there is no legal requirement that an applicant should declare the reason why it wished the information. It might, as the Permanent Court said in the *Memel* case, merely wish a "guide for the future".

"The Judgment accepts or rejects certain conclusions by the test of their acceptability as being reasonable. By this test I find it impossible to find that because the "missionary" rights under Article 5 may constitute what the Judgment calls "special interests" rights, or may have what it calls in some contexts a "double aspect", the Applicants' legal right or interest to prosecute a claim to judgment in regard to missionaries must be admitted but that they have no such right or interest in regard to the practice of apartheid. This seems to me an entirely artificial distinction, and, as I have shown, not supported by the history of the drafting. Because Applicants did not specifically invoke Article 5 in their Applications, the Judgment denies them the right to obtain a finding whether the Mandate - on which any such right would rest - still subsists. Applicants do base their ninth submission on Article 7 (1) which provides that the terms of the Mandate may not be changed without the consent of the Council of the League; the Judgment denies them the right to know whether even their admitted rights under Article 5 could be terminated by the unilateral act of the Mandatory although it is said that "there is no need to inquire" whether the consent of the Member would have been necessary. The Judgment does not say whether the consent of every Member would be necessary for the termination of a procedural clause. Looking at the history of the drafting of the Mandate with the intimate connection between the two paragraphs of Article 7, it again seems highly artificial to take a position as follows: the decision of the Court in 1962 that paragraph 2 of Article 7 survives, in whatever form or way, is accepted, but this surviving right of resort to the Court does not entitle Applicants to learn from the Court whether paragraph 1 of Article 7 is still in force, although if it is not, the Mandatory might also terminate the second paragraph of Article 7 and deny to Applicants even what are - under the Judgment of the Court - the meagre rights to file their applications and learn that the Court has jurisdiction. Jurisdiction to do what? Jurisdiction, according to the Judgment, to say that the Court cannot give effect to the claims because Applicants lack a legal right or interest.

"The intimation in the Judgment that the Applicants' interest in, for example, the practice of apartheid in the mandated territory of South West Africa, is only political and not legal, harks back to the Joint Dissent of 1962. At page 466 of that Joint Opinion, it was said that while a Court generally must "exclude from consideration all questions relating to the merits" when it is dealing with an issue of jurisdiction:

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It is nevertheless legitimate for a Court, in considering the jurisdictional aspects of any case, to take into account a factor which is fundamental to the jurisdiction of any tribunal, namely whether the issues arising on the merits are such as to be capable of objective legal determination.

“The opinion continued to say that the principal question on the merits would be whether the Mandatory is in breach of its obligations under Article 2 of the Mandate. They concluded – provisionally, it is true – that the problems presented are suitable for appreciation in a technical or political forum but that the task “hardly appears to be a judicial one”. The thesis that the interpretation of Article 2 of the Mandate is more political than legal is in effect another way of saying as today’s judgment says, that the interest of Applicants in the interpretation or application of Article 2 is political rather than legal. The question, viewed in this light, is a question of justiciability and thus requires an examination of the criteria which the Court could use in discharging this task. At least the third submission of the Applicants should be rejected if it is not a justiciable issue to determine whether the practice of apartheid in the mandated territory of South West Africa promotes “the material and moral well-being and the social progress of the inhabitants of the Territory”

*Judge Padilla Nervo:*¹⁶

“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:

¹⁶ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 443 and 452-453.

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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 decided 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 the basis or premise of the Court’s analysis and reasoning. This process has accordingly led the Court to its present decision.

.....

“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 judgment 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 pronounce on the main issues

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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 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)."

*Judge Isaac Forster:*¹⁷

.....

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

"This passes my understanding.

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

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

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

"The concept of a legal interest separate from the individual

¹⁷ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 478-480.

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interest of the applicant State is thus not unknown in international law. It can even be clearly seen in certain international treaties for the protection of minorities concluded after the Great War of 1914–1918. It there takes the form of a compulsory jurisdiction clause which confers the status of international dispute on any difference of opinion in regard to questions of law or of fact concerning the application of the treaty between the minority State and any Power which was a member of the Council of the League of Nations. It was not required that the Power which was a member of the Council of the League of Nations should be a contracting party to the minorities treaty, nor was it required it should have an individual legal interest. It was sufficient for it to apply to the Court in the general interest of a correct application of the régime.

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

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating

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to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice (sc. the International Court of Justice) provided for by Article 14 of the Covenant of the League of Nations.

“Contrary to the view taken by the majority, I personally am convinced that this provision made it possible for the Court to declare admissible the claims of Ethiopia and Liberia which, having been Members of the League of Nations, retain a legal interest in securing observance by the Mandatory of its undertakings so long as its presence in South West Africa continues. I find it hard to believe, as is held by the majority, that the second paragraph of Article 7 of the Mandate, providing for resort to an international tribunal, covered disputes relating only to the individual interests of States under the provisions of Article 5. It is not possible for me to accept that the authors of a Mandate, the essential (and highly altruistic) purpose of which was the promotion by all the means in the Mandatory’s power of the material and moral well-being and social progress of the inhabitants of the territory, when they came to Article 7 had lost the generous impulses by which they were inspired at the beginning and, selfishly, no longer had in mind, in the event of resort to international justice, anything more than the individual legal interest of Member States. This would not fit in with the context or with the terms of the provision itself, which reads:

... if *any dispute whatever* should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate...

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

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

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

In view of the Court’s finding that the Applicants had no legal right or interest in the subject-matter of their claims, the judgment of the Court did not proceed to consider those aspects of the merits of the case such as 1) the question of whether the Mandate had lapsed or continued to be in force. 2) the question whether the Mandatory had practised apartheid in the mandated territory in violation of the terms of the Mandate. However the Dissenting Opinions make some reference to these as well as other aspects of the merits.

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D – Has the Mandate lapsed?

*Judge Jessup:*¹⁸

“Another argument has been advanced which, if well-founded, would negative the existence of Applicants’ right to institute proceedings under Article 7(2) of the Mandate. The first of Respondent’s final submissions as presented to the Court by Respondent’s Agent on 5 November 1965 reads as follows:

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.

“It has already been pointed out that there is nothing in the so-called “new facts” presented by Respondent which would lead the Court to reconsider the view which it has consistently taken since 1950 that the Mandate did not lapse on the dissolution of the League. On this point the Court was unanimous in 1950 and there were no opposing views expressed in 1955 or 1956. Moreover it is still true, as the Court stated in its Advisory Opinion of 1950, quoted by the Court in its 1962 Judgment, that –

If the Mandate lapsed, as the Union Government contends, the latter’s authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified. (*I.C.J. Reports 1962*, p. 333.)

“In the present phase of the case, Respondent sought to surmount this difficulty by alleging that it had a title to South West Africa based on conquest. On 27 May 1965, counsel for Respondent stated (C.R. 65/39, p. 37): “The Respondent says, Mr. President, that the legal nature of its rights is such as is recognized in international law as flowing from military conquest.” It is doubtful whether Respondent relied heavily on this argument which is in any case devoid of legal foundation.

“It is a commonplace that international law does not recognize military conquest as a source of title. It will suffice to quote from Lauterpacht’s *Oppenheim* (8th ed., Vol. 1, p. 567):

Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title and is a mode of acquiring territory. It is, however, quite usual to speak of “title by conquest”, and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a

¹⁸ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 418-419.

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belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.

“It is of course known that Germany did not cede South West Africa to South Africa and that South Africa did not conquer the whole of the territory of Germany.”

E – Is the Mandatory’s Policy of Apartheid a Breach of the Provisions of the Mandate?

*Judge Isaac Forster:*¹⁹

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

“The Court’s silence concerning the Mandatory’s conduct is disturbing when it is recalled that the very same Court, in its earlier Judgment of 1962, upheld its jurisdiction to adjudicate upon the merits of the dispute. The Court now declines to give effect to the claim of Ethiopia and Liberia on the ground that the Applicants have no legal interest in the action. I repeat once again my conviction that the classic notion of individual legal interest is not the only acceptable one, and that it is not necessarily applicable in proceedings instituted with reference to the interpretation and application of an international mandate, the beneficiaries of whose provisions are not the States which subscribed to them but African peoples who have no access to the Court because they do not yet constitute a State. Nor is the doctrine of legal interest one of crystal-line clarity. Distinguished lawyers when discussing the subject have on occasion had to admit that “the concept of interest is however inherently vague and many-sided . . .” (Paul Cuche, quondam Dean of the Grenoble Law Faculty; Jean Vincent, Professor of Law and Economics at Lyon University. *Précis Dalloz*, 12th ed., 1960, p. 19.)

¹⁹ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 481-483.

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.....
“If the Court had only consented to take its examination of the merits a little further it would have found the multiplicity of impediments put in the way of coloured people in all fields of social life. Barriers abound: in admission to employment, in access to vocational training, in conditions placed on residence and freedom of movement; even in religious worship and at the moment of holy communion.

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

*Judge Padilla Nervo:*²⁰

“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 being 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-

²⁰ South West Africa, Second Phase, Judgment, International Court of Justice Reports 1966, pp. 467-470.

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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 international 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 cooperation between them in the pursuit of the aims of the Organization.

“And Judge Azevedo: “The General Assembly has retained a

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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 Member States 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 of 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 Member States 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

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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. 1, p. 4.) The Charter of the United Nations and the urgency of current international problems and aspirations have turned the course of 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 purpose 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.”

THE INTERNATIONAL COURT AND SOUTH WEST AFRICA

THE IMPLICATIONS OF THE JUDGMENT*

by

ROSALYN HIGGINS **

The recent international litigation over South West Africa, and the judgment which the International Court of Justice eventually handed down on July 18, 1966, have both attracted much public interest to the Court and excited much comment from laymen no less than lawyers.

There can be little doubt that the judgment will be of great significance so far as both international law and international politics are concerned. Law and politics are here so closely interwoven that to understand the Judgment — and to try to assess its consequences — requires first a brief résumé of the events leading to the litigation.

I. BACKGROUND

South West Africa, a former German colony, was placed under mandate at the end of the First World War. Article 22 of the League of Nations Covenant laid down the Mandate system, under which ex-enemy territories would be governed by individual states, who in turn were to be accountable to the League. The peoples in these ex-enemy territories who were 'not yet able to stand by themselves under the strenuous conditions of the modern world' were to be governed for their own 'well-being and development' and as 'a sacred trust for civilization' (Article 22(1)). South West Africa was classified as a 'C' Group Mandate — that is to say, one which was regarded as appropriate to be administered as an integral portion of the Mandatory's territory; and it was allotted to his Britannic Majesty, for and on behalf of South Africa. Under Article 2 of the Mandate, South Africa was required to 'promote to the utmost the material and moral well-being and social progress of the inhabitants';

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and under Article 6 agreed to submit reports annually to the League Council.

When the League died, the United Nations established a system which was comparable in many respects — the trusteeship system. Article 77 of the UN Charter specified that the trusteeship system

'shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (a) territories now held under mandate...'

South Africa was the only Mandatory not to place her territory under trusteeship, and after 1949 ceased to send any reports to the UN. She denied any legal obligation to submit to the supervision of the UN, declaring that the Mandate, and all the duties incurred thereunder, had lapsed with the dissolution of the League. Alongside the political measures which the UN initiated to break out of this *impasse*, the General Assembly asked the International Court a series of legal questions, to which the Court gave its replies in three Advisory Opinions.

In 1950, the Court advised that South West Africa was still a mandated territory; it rejected South Africa's contention that the Mandate had lapsed with the demise of the League. The Court emphasised that the Mandate was more than a mere contract between parties — it was an 'international institution with an international object — a sacred trust of civilization'¹ — and still survived. The Court also observed that if the Mandate had lapsed, so would any rights which South Africa had in the territory. As a Mandatory, South Africa was, the Court advised, under a legal obligation to submit to international supervision and to provide reports. The General Assembly was legally qualified to exercise the supervisory functions concerning the Mandate.

At the same time, the Court indicated that South Africa was *not* obliged to place South West Africa under the new trusteeship system of the Charter; though South Africa could not legally deny the continued existence of the Mandate and her own obligations thereunder, she was entitled to insist upon the retention of the status of South West Africa as a mandated territory rather than as a UN trusteeship territory.

The Assembly sought to fulfil its supervisory role as best it could, in the absence of annual reports from South Africa and in face of a refusal to give effect to the Court's Advisory Opinion.² South Africa contended that any decision which the General Assembly purported to reach on oral and written petitions from South West

¹ ICJ Reports, *Status of South West Africa*, 1950, p. 132.

² Advisory Opinions, though authoritative, are not strictly binding, whereas Judgments of the Court are: See below.

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Africa were invalid, since they had been taken by a two-thirds majority. South Africa pointed out that the League Council, when it had supervised the Mandate, required unanimity. The Court confirmed the propriety of the Assembly's action in an Advisory Opinion given in 1955.³

The very next year South West Africa was again before the Court, which was now asked whether the Assembly's subcommittee on South West Africa (established in 1953) was entitled to grant hearings to petitioners. This issue turned on whether the granting of oral hearings — when the League Council had only made use of written petitions — was a new and unjustified degree of supervision by the United Nations. The Court once more found that the Assembly's procedure was justified; although it was correct that the UN General Assembly should not seek to extend its supervisory powers beyond those of the League of Nations, nonetheless the League Council could have decided to receive oral petitions if it had so desired: and thus this authority was available to the Assembly.⁴ From 1956 to 1960 the question of the Mandate was dealt with largely in the General Assembly of the United Nations, but, in spite of a plethora of committees assigned to examine the question, little progress was made. By the end of that decade, with many new African states now members of the UN, a new idea took root — namely, to explore the possibilities which contentious litigation offered in respect of South West Africa.

II. CONTENTIOUS PROCEEDINGS, 1960-1966

A judgment of the Court, given in respect of particular litigation, is binding upon the parties. Advisory Opinions of the Court, given in response to requests by UN organs or agencies, are not.

This situation, together with the fact that procedures for enforcing a judgment of the Court (but not an Advisory Opinion) exist in the Charter, made the African states eager to engage in litigation over South West Africa.

Article 7 of the Mandate had provided that

' if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice'.

Ethiopia and Liberia, both former Members of the League, decided to institute proceedings, and they claimed that the Inter-

³ *ICJ Reports, SW Africa Voting Procedure, 1955.*

⁴ *ICJ Reports, Hearing of Oral Petitions on SW Africa, 1956.*

national Court was the appropriate forum, since Article 37 of its Statute states:

'Whenever a treaty or convention in force provides for reference of a matter to ... the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'

The applicants asked the Court to confirm that South West Africa was a territory under Mandate, and to find that the Mandate was a treaty within the meaning of Article 37 of the Court's statute; that South Africa retained the obligations under the Mandate and under Article 22 of the League; and that the UN was entitled to exercise the supervisory functions of the League in relation to the mandated territory. In addition, the Court was invited to go beyond its Advisory Opinions, and to find that South Africa had violated its obligations under the Mandate through, *inter alia*, introducing *apartheid*, establishing military bases in South West Africa, and refusing to submit reports and to transmit petitions.

South Africa denied that the Court had jurisdiction to examine these claims. She argued that the Mandate was not a 'treaty or convention in force' (as required by Article 37 of the Statute of the Court), having died with the League. The Union Government also contended that neither Ethiopia nor Liberia was 'another Member of the League of Nations' (as required by Article 7 of the Mandate); and that no 'dispute' existed on which jurisdiction under that Article could be founded, because no material interests of Ethiopia or Liberia or of their nationals were involved. Finally, South Africa denied that the alleged dispute was one which 'cannot be settled by negotiation' within the meaning of Article 7 of the Mandate.

Given these objections, the International Court decided that a preliminary judgment concerning its jurisdiction was needed, to see if it had the authority to examine the substantive claims made by the Applicants. On December 21, 1962, the Court found — by the narrowest possible majority, eight votes to seven — that it had jurisdiction to proceed to an examination of the merits of the case. The Court declared that the Mandate was indeed an international agreement having the character of a treaty. This treaty established an 'international' régime which could not be said to have lapsed with the dissolution of the League. The Court said that the Clause (Article 7) of the Mandate which related to judicial recourse in the event of a dispute was an essential component of the administration of 'a sacred trust of civilization', and that it also survived; and that Ethiopia and Liberia could each be termed 'another Member of the League of Nations', within the meaning of the Article. Further the Court rejected South Africa's argument that, in the absence of any special or material interest in South West Africa by Ethiopia and

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Liberia, no 'dispute' could be said to exist. The Court found that a 'dispute' existed nonetheless, and that the deadlock which had been reached warranted the deduction that this dispute could not be settled by negotiation.⁵

Having rejected all of South Africa's objections to its jurisdiction, the path was now clear for the Court to proceed to examine the substantive merits of the case. And this it did, between 1962 and 1966 in written and oral proceedings of unprecedented volume and complexity.

The judgment which the Court eventually handed down on July 18, 1966, came as a great surprise to the waiting world, because it did not in fact provide any answers to the substantive issues raised by the parties. Instead, the Court declared (by the President's casting vote, seven votes to seven) that it had first decided to deal with an 'antecedent' question: namely, whether Ethiopia and Liberia had any 'legal interest' in the subject-matter of their claim. The Court said that unless this could be answered in the affirmative, Ethiopia and Liberia would not be entitled to a Judgment from the Court. The Court then proceeded to find that those clauses of the Mandate which referred to the 'conduct' or carrying out of the duties of the Mandatory, did *not* give a right to *all* League members to have recourse to the Court: that in respect of these 'conduct' provisions they first had to show some special, national interest before they were entitled to a pronouncement from the Court. And the Court found that neither Ethiopia nor Liberia had such 'special' interests. The Court thus declined to adjudicate, one way or the other, on the merits of the case.

How did this result come about? Is the argument unanswerable at law? And what are the likely repercussions? It is to these questions that the rest of this article is addressed.

III. THE PROBLEMS PRESENTED BY THE JUDGMENT

The Court's judgment of July — and the separate and dissenting opinions attached thereto — lay before us legal considerations of the utmost fascination. Both because of the professional complexity of the points involved, and because of the sheer volume of the judgment (it runs to some 505 pages), it is obviously inappropriate to examine them in any detail here.

Nevertheless, while for lawyers there is in the decision a wealth of jurisprudence that will have to be closely studied, three or four particular questions emerge which, while essentially legal in nature,

⁵ *ICJ Reports, Ethiopia v. South Africa; Liberia v. South Africa, Preliminary Objections 1962.*

raise policy considerations of fundamental importance and thus merit further comment here.

A. How does it come about at this stage that the Court can decide — after a judgment in 1962 on the preliminary issues, and after four years' litigation on the substantive merits of the dispute — that it must decline to pronounce at all on the Applicants' claims?

There are several closely related points here. The first is to ask whether, in a case on the merits of the dispute, the Court can base its Judgment on the Applicants' legal standing, rather than on the rights and wrongs of their legal arguments. In the present stage of international law, the competence of the International Court is only a limited one, and a reluctant litigant — that is to say, a Respondent to a legal claim which the Applicant wishes to place before the Court for adjudication — may seek to show that the Court's competence is inadequate in this particular regard. The Court will hear arguments from both the parties on this matter, and will then pronounce on these preliminary objections raised by the Respondent. This is, of course, exactly what happened in the 1962 Judgment of the Court in which it found, by eight votes to seven, that it had jurisdiction to proceed to an adjudication of the merits of this dispute over South West Africa.

It must be explained, however, that it is not legally necessary for there to be a rigid separation in time between consideration of the jurisdiction of the Court and consideration of the merits of the arguments. The Court may, after a hearing on a preliminary point, either accept the Respondent's⁶ arguments (in which case the Applicant's case will be dismissed, and he will not be entitled to proceed to the next phase of the litigation, to argue the merits of the dispute); or reject the Respondent's arguments (in which case the Applicant will be entitled so to proceed). But a third alternative is available to the Court, whereby it may decide (under Article 62(5) of the Rules of Court) to attach all of the preliminary objections, or such preliminary objections as it chooses, to the subsequent case on the merits of the dispute. The major reason for this is, quite simply, because the arguments on a particular preliminary jurisdictional point may be very similar to those which would be raised on the

⁶ In actual fact, when a self-contained case takes place on preliminary objections which have been raised, the State which raises the objections (and who would be the Respondent in any subsequent case on the merits) appears now as the Applicant. But, for the sake of clarity, I have used the term 'Applicant' and 'Respondent' throughout in reference to the same parties, i.e. in the context of the South West African case, the Applicants are taken to mean Ethiopia and Liberia, and the Respondent South Africa.

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merits of the case; and thus it is convenient and economical for the Court to look at them together. The Court has availed itself on many occasions of this right to join preliminary objections to its examination of the merits.⁷

The logical outcome of this is that it is possible, after extended litigation on the merits of a dispute, for the Court to decide the case against the Applicant on the grounds of what originally appeared as a preliminary objection. The instinctive reaction of many laymen is to assume that this is a scandalous waste of time and resources, and yet another example of the law as an ass. But it has to be remembered that the attachment of a preliminary objection to the merits of the case may in fact have prevented a wasteful repetition of the arguments in both phases of the case. Thus, in so far as criticism of the Judgment of July 1966 rests simply on the fact that the Court's grounds for this decision, after long litigation on matters of substance, appeared to rest on preliminary or jurisdictional matters, the criticism rather misses the point.

The really relevant point, in the view of this writer, is the Court's reliance on such points, at the end of a long case on the merits, when it had *given no indication at all* to the parties, at the end of the preliminary case that it proposed to carry certain points forward to be attached to the merits. Not only is there no precedent for this, but the failure to give notice that certain preliminary points will be attached to the subsequent case on the merits effectively removes from the Applicant the option to withdraw at that stage, if he believes that the risks are too great to proceed to the merits. In the case of poor nations, facing the cost of protracted litigation, this is an option which should certainly be safeguarded. Moreover, a failure to indicate that certain preliminary points remain to be examined at the same time as the merits, makes it exceedingly difficult for counsel to direct their pleadings to all the relevant points.

Ethiopia and Liberia had every reason to believe that all questions relating to their right to obtain a judgment had already been settled in 1962. The Court has now classified the grounds on which it declined to pronounce on the merits of the case as a question 'that appertained to the merits of this case but which had an antecedent character'. It further said that 'despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved.'⁸ The question remains, however — why were the parties given no warning in 1962 that an 'antecedent question' remained to be answered, and why did the Court proceed to assume,

⁷ See, for example, the *Barcelona Traction Case* (preliminary objections) 1964, p. 43; *Rights of Passage Case* (preliminary objections) 1957, pp. 150-152.

⁸ *South West Africa, Second Phase, Judgment*, *ICJ Reports 1966*, (hereafter referred to as *ICJ Reports 1966*), p. 18.

without full argument, the propriety of its action in raising the point at this juncture? There is nothing in the judgment which, to this writer, provides a satisfactory answer.

B. Has the Court really reversed its own decision of 1962? That is to say, how compatible is its present Judgment with its Judgment in 1962 that it had jurisdiction to proceed to the merits?

In fact the Court never addressed itself to the line of argument laid out in the preceding paragraph, because it indicated that the right or otherwise of Ethiopia and Liberia to obtain an answer from it, though of an 'antecedent character' was *not* a 'preliminary question'. Now, the question is not whether such an exceedingly fine distinction is known to the law (conceptually, it is, under the established distinction between jurisdiction and admissibility) but whether it was appropriate or valid to this particular case. It is extremely difficult to see that the question of Ethiopia's and Liberia's legal right in the subject-matter of their claims (which was the point at issue) was not a preliminary matter to be disposed of in the first phase of proceedings culminating in 1962, and that it had indeed been so disposed of.

It will be recalled that in 1962 the Court had been asked by South Africa to declare that Ethiopia and Liberia could not institute proceedings under the enabling clause of Article 7 (2) of the Mandate. Among the arguments she had advanced was that no 'dispute' (as required in Article 7 (2)) existed between herself and Ethiopia and Liberia, because they had no special, national interest in the Mandate over South West Africa. The Court had rejected this argument. But now, in 1966, the Court sought to explain this effective reversal by saying: 'To hold that the parties in any given case belong to the category of State specified in the Clause — that the dispute has the specified character — and that the forum is the one specified — is not the same thing as finding the existence of a legal right or interest relative to the merits of the claim.'⁹ But it *must* be the same thing — for the categories of State specified in the clause are presumably those who *do* have a legal interest in the carrying out of the Mandate. Moreover, the Court in 1962 classified the Applicants as falling within that category, not as an abstract proposition, but in relation to an already existing and formulated set of claims.

Agreement with the judgment on this point entails acceptance of the Court's view that the evidence showed that a right of access to the Court by individual members was only intended in respect of national rights under the Mandate, and that it was only in respect of these that they had a legal interest. Yet the dissenting judges, exam-

⁹ *ICJ Reports 1966*, p. 37.

ining the same evidence, reached a different conclusion, finding that an individual League member had a general legal interest in the observation of the Mandate, from which could flow a right to secure a Judgment from the Court under Article 7. The premises on which the Court's view rests, moreover, are not in accordance with the common legal practice whereby success in showing standing to initiate an action in a particular forum presupposes a legal interest in the subject matter.

If the Court is really saying that Ethiopia and Liberia can be adjudicated in 1962 to have legal standing to bring a case, but not to be entitled to get an answer in 1966 because of lack of legal interest in the subject-matter, then one is entitled to ask the Court: 'What claim could Ethiopia and Liberia have presented after they had been deemed entitled to proceed in 1962, in order to get an answer from the Court?' To reply, as the Court does by implication, that a claim which rested on a 'special interest' would have got an answer, is hardly satisfactory. For the Court knew in 1962 that Ethiopia and Liberia were claiming no 'special' or 'national' interest in the Mandate, but only that legal interest inherent in all former members of the League. Moreover, in 1962 the Court had heard much argument on the point of whether a dispute sufficient to institute proceedings existed between the Applicants and the Respondent; and it had addressed itself to the question of this, relying in turn upon Ethiopia and Liberia showing a special particular interest in the implementation of the Mandate. The Court explicitly stated 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.¹⁰

It thus remains baffling for the Court to assert that it was now dealing with a new point, which had not been covered in 1962. It seems impossible to disagree with the view expressed by the distinguished United States member of the Court, Judge Jessup, that the Court had in effect reversed its judgment of 1962.¹¹ (This is a point separate from, though related to, the question of *res judicata* — namely, the finality of a judicial decision, and whether a decision on jurisdiction can so be classified, thus preventing a subsequent reversal. The various judges did address themselves at some length to this question, but the Court did not regard it as directly relevant, simply because it declared that the finding that the Court had jurisdiction in 1962 was different from a finding that the Applicants did not have legal standing in the next phase of the case.)

¹⁰ *ICJ Reports, 1962*, p. 343.

¹¹ *ICJ Reports, 1966*, p. 330.

Two other points require mention in this context. The first is that the grounds upon which the Court gave its Judgment — namely, a lack of legal interest by the Applicants in the subject-matter of the claim — was not even advanced in the final submissions by the Respondent.¹² The Court, however, while conceding that South Africa's final submissions 'ask simply for a rejection of those of the Applicants, both generally and in detail' (that is, on the substantive issues), pointed out that the final submissions did at least ask the Court to base its findings on 'statements of fact and law as set forth in (its) pleadings . . .', and that South Africa had, in the course of its pleadings, denied that the Applicants had any legal standing in the subject-matter of their claim. The Court then suggested that, given the 1962 Judgment, 'it clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate'. Thus the Court points to a legal argument made by South Africa at one remove, supposes that it relates to the merits and not to jurisdiction (though several of South Africa's arguments on the merits were in effect a mere repetition of its previous objections to the Court's jurisdiction, presumably entered for the record), and then relies on that argument, rather than addressing itself to the clear and unambiguous, albeit voluminous large, argument on the substance of the dispute.

This leads us to the second point. The Court then also indicated in its latest Judgment, undoubtedly correctly, that it is entitled to select *proprio motu* the basis of its decision. That is to say, under Article 53 of its Statute, it is, by implication, not required to rely on arguments advanced by the litigants, but can rely on what it finds the most telling and relevant legal grounds. This is a well-established legal principle, but, with all due deference, its invocation does not really seem to answer all the points we have raised. As with any other legal principle, its nature and scope are subject to certain limitations: and it remains relevant to ask whether, when there has already been a judicial decision on preliminary questions, and when the Court has failed to avail itself of its right to declare that certain outstanding preliminary points shall be attached to the subsequent case on the merits, it is really open to the Court to rely, after four years of litigation, upon the *proprio motu* principle to discover an outstanding 'antecedent question pertaining to the merits'. Reliance on the *proprio motu* argument, in the particular circumstances of this case, seems to this writer to run counter to another well-established principle of international law — '*interest rei publicae res iudicata non rescindi*'. The *proprio motu* principle is not a licence to ignore established legal concepts, nor to avoid issues upon which one has

¹² As pointed out by Judge Jessup, at p. 328.

legal jurisdiction to pronounce; it is a principle designed to affirm the Court's superior understanding of the law to that of the parties before it.

C. Was the Court in any event correct in its assertion that the Applicants had to show a 'special' legal interest in the Mandate before they could require the Court to give a declaratory Judgment on litigation relating to it?

Quite apart from the question of the compatibility of the Court's insistence that such a 'special' interest be shown with its own Judgment of 1962, is this alleged requirement really valid at law? This problem is argued very fully in the Judgment itself,¹³ and one can do no more here than to provide a brief and compressed version of the different views.

On this question, the Court rested its case on the view that the substantive provisions of the Mandate fell into two broad categories — those provisions which conferred certain rights relative to the mandated territory upon members of the League as individual States, and those provisions which defined the Mandatory's powers and obligations. This latter category the Court termed 'conduct' provisions, and they include the system of international accountability by the Mandatory for the proper carrying out of its obligations. An example which the Court gave of the former 'particular' category was the guarantee, in Article 5 of the South West Africa Mandate, that missionaries of the nationality of any League Member should be able to enter South West Africa. As we have seen, Article 7 of the Mandate provides that 'if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute . . . shall be submitted to the Permanent Court of International Justice . . .'

The Court, basing itself upon the distinction it had drawn between the two categories of provisions in the Mandate, said in the 1966 Judgment that the right of access to the Court, provided for in Article 7 *was only available to individual States in relation to alleged breaches of particular rights which they had been granted in respect of the mandated territory* (such as the right of entry for missionaries of their own nationality). The Court thus *rejected the notion that individual States could submit to it a dispute about the 'conduct' provisions*, that is, about the proper carrying out of the Mandate by

¹³ And a close reading of both the 1962 and 1966 Judgments is necessary for a proper understanding of this point, not least because the answer turns in part upon the intentions of the drafters of the Mandate. See *ICJ Reports*, 1966, pp. 20-23, 25-34; see also pp. 378-388, per Judge Jessup.

the Mandatory. The Court found that it was for the League Council to go to the Court about such aspects of the Mandate.

Several things need to be said about this. The first is that the distinction which the Court is seeking to draw between 'particular' provisions and 'conduct' provisions — and especially the corollary that different legal interests exist for the implementation of these two categories — is a concept hitherto unpropounded in international law. There is nothing in the wording of Article 7 of the Mandate which supports it: while it is ambiguous as to whether the League Council or individual members (or both) may take a dispute to the Court, it does not indicate that individual Members may go to the Court about disputes over 'particular rights' provisions, while only the League Council itself may go to the Court over 'conduct' provisions.

The implications of what the Court has here said are exceedingly important, not only in respect of this particular litigation, but because it clearly implies that only the United Nations may go to the Court for legal determination of disputed matters relating to the 'conduct' provisions. Yet — and this is a point the repercussions of which the Court completely sidesteps in its Judgment — the United Nations (like the League Council) is only entitled at law to ask for an Advisory Opinion. An Advisory Opinion is not legally binding, and South Africa has already shown, by her response to the three earlier Advisory Opinions on South West Africa, that she does not feel obliged to comply with these judicial Opinions. Only states may seek from the Court a Judgment, which *is* legally binding. Thus the effect of the Court's Judgment is to rule that in spite of the recourse to judicial procedure provided for in Article 7 of the Mandate, no Mandatory in breach of its obligations under the Mandate will be faced by a binding judgment thereon. There is removed from the Mandatory the sanction of being publicly seen not to comply with a binding Judgment of the International Court. And of course, the possibility of enforcing compliance with such a Judgment, under the terms of Article 94 of the Charter,¹⁴ is also removed. By its judgment then, the Court is, in principle, protecting a Mandatory who may be in breach of a Mandate, both from the full legal force of a binding adjudication¹⁵ and from ensuing political action (should

¹⁴ Article 94 states, in para. 2: 'If any party to a case fails to perform the obligations incumbent upon it under a Judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems it necessary, make recommendations or decide upon measures to be taken to give effect to the Judgment'.

¹⁵ There is one side point that may be mentioned here: it is, perhaps, just conceivable, that within the terms of the Court's distinction of the legal rights flowing from the 'particular' and 'conduct' provisions, there does exist still a State or States who can show (though Ethiopia and Liberia could not)

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it be deemed necessary) to secure compliance with that adjudication. This can hardly be what was envisaged by those who framed the Mandate provisions, given their intention to promote a system of effective international accountability. The Court's pronouncement on this point militates against any effective supervision of the 'conduct' provisions, which lie at the heart of a Mandate. This point, it must be emphasised, is a general one: it does not entail any assumptions as to whether South Africa is, or is not, in breach of her obligations under the Mandate for South West Africa.

As early as 1950, in the Advisory Opinion (though this particular point was not then directly in issue) the then British member of the International Court, Sir Arnold McNair (as he then was), stated:

'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 ...'¹⁶

And Judge Read — who, like Sir Arnold McNair formed part of the majority of the Court on this occasion, and attached a separate opinion¹⁷ — also firmly declared:

'the first, and the most important (of the international obligations of the Mandatory) were obligations designed to secure and protect the well-being of the inhabitants. They did not enure to the benefit of the Members of the League, although each and every Member had a legal right to insist upon their discharge ... and 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)'.¹⁸

In 1962 the Court (the majority of which did not, of course, comprise those members forming the majority in 1966) itself declared:

'The only effective recourse for protection of the sacred trust would be for a member or members of the League to ... bring the dispute ... to the Court for adjudication'.

a sufficient legal interest in the 'conduct' of the Mandate to secure a Judgment from the Court. The Principal and Allied Associated Powers come to mind, but the whole tenor of the Court's Judgment goes against their possible success as litigants. Indeed, Judge Jessup, in his dissenting Judgment, excludes the possibility.

¹⁶ Advisory Opinion on the International Status of South West Africa, *ICJ Reports, 1950*, at p. 158.

¹⁷ Under Article 57 of the Statute of the Court, the right is given to a Judge, if his views do not coincide on all points with the majority judgment, and whether he agrees with that judgment or not, to give a 'separate opinion'. Thus both Judges who cast their votes for the majority's decision, and those who vote against it, may append separate statements. The separate opinions of those disagreeing with the majority view are customarily called 'dissenting opinions'.

¹⁸ *Ibid.*, pp. 164, 165.

Indeed

'without this additional security the supervision by the League and its members could not be effective in the last resort'.¹⁹

It only remains to add that a considerable body of evidence supporting this viewpoint was pressed by Judge Jessup and the other dissenting Judges in the 1966 Judgment.

IV. HOW IT CAME ABOUT — THE EXTRA-LEGAL FACTORS

There has, since the Court's Judgment, been a good deal of public interest expressed in the question of the independence of an international judiciary from national pressures. The Court has always shown itself to be an independently-minded body of the highest standing, and there has been no evidence that Judges have been subject to pressures from their own governments. Still less is it to be supposed that they have succumbed to any such pressure. Indeed, there have been occasions when a judge has voted against the claims of his own country when it brought a case before the Court, and the bench has been scrupulous in its judicial impartiality. Moreover, it can be safely asserted that Western Foreign Offices would consider such pressure to be as undesirable as would the Judges themselves, well knowing that a really free judiciary is a safeguard to be supported at all costs. What the Judges decided — in this case as in others — is what they believe the law to be and nothing else.

This is not to say, however, that individual Judges are completely uninfluenced by their background. One's particular form of legal training, and the community in which one has lived, inevitably affect one's general philosophy and outlook. But the study and pursuit of international law transcend national boundaries, and any one Judge will, in the acquisition of his great learning, have been exposed to more than purely national influences. Those who seek to examine personal factors in the Judgments of the Court will find it hard to point to clearcut 'national' or 'ideological' attitudes: and the votes in this *South-West Africa Case* — with the Russian and United States Judges dissenting, and the Polish and British Judges voting with the majority — illustrate this principle. Infinitely more relevant are individual, intellectual differences of outlook concerning the scope and nature of international law, and of the Court itself. It is here that certain differences in attitude between the various Judges become more predictable.

It has been interesting to observe an apparently fairly widely-held lay assumption which has come to light in the wake of this

¹⁹ *ICJ Reports 1962*, p. 336.

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case: namely, that if a group of lawyers are indeed impartial, and free from undue pressure, they should therefore necessarily come up with the same legal conclusions in a given case. But the legal process does not involve merely the application of certain rules to particular circumstances; it also involves interpreting whether the scope of certain rules does indeed extend to the particular circumstances. And it is in this interpretative function — which is particularly important in the international system, lacking as it does a central legislature — that the individual standpoints and philosophies of the individual Judges become so relevant.

When discussing — as we have above — whether in fact the Court in 1966 effectively reversed its own decision in 1962, it must be borne in mind that the Judges who comprised the majority in 1966, and thus speak for 'The Court' as such, were those who formed the minority in 1962. The delicate balance of eight to seven, which had been struck on the jurisdictional questions decided in 1962, was altered in the intervening months by a series of unforeseeable events. Judge Bawadi of Egypt died; at the elections held to fill this vacancy, Judge Ammoun of the Lebanon was successful, but obviously he could not be brought into the case after proceedings had begun. Judge Bustamante y Rivero was prevented by illness from participating. And it is now general knowledge that Judge Sir Zafrullah Khan, of Pakistan, withdrew from the case.²⁰

Further the Judgment of the Court begins by saying that on March 14, 1965, South Africa

'notified the Court of its intention to make an application to the Court relating to the composition of the Court... The Court heard the contention of the Parties with regard to the application at closed hearings...'

But, the Judgment continues, the Court

'decided not to accede to the application'.²¹

This application is believed to have been in respect of Judge Padilla Nervo ²². As for Judge Sir Zafrullah Khan, there remain two alternatives — either that Judge Sir Zafrullah Khan withdrew on his own initiative, or that he withdrew as the result of a suggestion

²⁰ Not least because of Sir Zafrullah Khan's own comments to various newspapers, e.g. *The Observer*, July 1965.

²¹ *ICJ Reports 1966*, p. 9.

²² See the comment by one of the most learned commentators on the Court, who notes that the identity of the Judge concerned was not mentioned in either South Africa's published basis of application or the Court's order thereon (March 18, 1965), but adds: 'cf. the Judges present at the public hearings of 15 and 18 March 1965 and those "present" for the order'. Rosenne, *The Law and Practice of the International Court*, Vol. 1, p. 196.

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by the President of the Court. Both these possibilities would fall within Article 24 of the Statute of the Court:

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

It is idle to speculate as to what occurred behind closed doors. Suffice it to say that the comments made to the Press by Judge Sir Zafrullah Khan, indicate that his withdrawal was as a result of action falling within Article 24 (2) and (3) above. As to the grounds for such withdrawal, here too, one is necessarily within the realm of speculation. But it is believed that two main grounds were advanced — that the Judge concerned had been a prominent member of his national delegation at the UN at a time when it had voted against South Africa on South-West African matters²³; and that he had at one stage been nominated by Ethiopia and Liberia as their intended Judge *ad hoc*, though he did not in fact so act, as he was elected to the Court itself. (Under Article 31 of the Statute, a party which has no national Judge sitting upon the Bench is entitled to appoint a Judge *ad hoc* for the particular case. Neither South Africa, on the one hand, nor Ethiopia or Liberia on the other, had nationals currently on the Bench. The former selected Judge van Wyk of South Africa, and the latter Judge Mbanefo of Nigeria).

Article 17 of the Court's statute stipulates that no person may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of another Court, or of a commission of enquiry, 'or in any other capacity'. Whether this last phrase is broad enough to cover mere designation as a Judge *ad hoc*, without subsequent participation, is doubtful. But the broader wording of Article 24 would seem to give the President of the Court authority to raise such a point as 'some special reason' why a Judge should not sit in a particular case, and for the Court to decide upon this matter. A regular Judge of the Court who happens to be of the nationality of one of the Parties before it is entitled to remain upon the Bench: his judicial impartiality is assumed. It was, of course, never intended that the right to nominate an *ad hoc* Judge should introduce an element of

²³ This argument is believed also to have been raised by South Africa in respect of Judge Padilla Nervo. If this is correct, then it is likely that the alternative ground — nomination to the *ad hoc* judgeship — was to prove telling in Sir Zafrullah Khan's case.

bias — rather was it granted to encourage nations which did not happen to have a national upon the Bench to use the Court nonetheless: it was thought of as an unnecessary but confidence-inspiring concession to human suspicion. While the statistical sample is smaller, it is nonetheless true, however, that *ad hoc* Judges have been less ready to vote against the party nominating them. Occasionally, on very limited points, they have done so, but this has happened proportionately less frequently than permanent Judges on the Bench have voted against their own nations.²⁴

There have been examples, before the Permanent Court of International Justice, of a judge previously nominated *ad hoc* sitting, in the event, as a member of the Court in respect of the same case, having been elected to the Court in the interim.²⁵

It would seem, therefore, that this does not cause automatic ineligibility: the residual authority of the President under Article 24 (2) would seem to rest upon evidence of some *personal* disability of the particular judge concerned.

In looking at the factors surrounding this decision, a further point deserves consideration. The Court has, in the past, been understandably concerned to uphold the authority of international law. One proper means of doing this has been by refusing to exercise its jurisdiction if its judgment were to be 'without object' — that is to say, without any legal effect whatsoever. Thus if, as in the case alluded to here, the argument related to rights and duties under a no-longer existing treaty, the Court may decline to adjudicate.²⁶ But the question of susceptibility of compliance must be an objective one, and

'a legitimate exercise of judicial reasoning. It would . . . be quite improper for the Court to contemplate a refusal by one party to comply with its decision, and to take that as a ground for its decision on the matter of propriety'.²⁷

²⁴ The relevance of this depends, of course, on the merit or otherwise of the particular claims advanced; so no general conclusion can be drawn. But for the details, see Rosenne, *op. cit.*, Vol. 2, pp. 939-942.

²⁵ Thus Judge Charles de Visscher was nominated as *ad hoc* judge by Belgium in respect of both the *Borchgrave Case* (vs. Spain) and the *Water from the Meuse Case* (vs. Netherlands). In both cases he sat upon the Court in his subsequent capacity as an elected Judge of the Court: PCIJ Series A/B, No. 70, p. 5; *ibid.*, No. 72, p. 160. Judge Zafrullah Khan was not, of course, a national of Ethiopia or Liberia: consequently, his subsequent election to the Court did not deprive them of their right to a judge *ad hoc*. Once again, they did not nominate a judge of their own nationality.

²⁶ *Northern Cameroons Case*, ICJ Reports, 1963.

²⁷ Rosenne, *The Law and Practice of the International Court*, Vol. 1, p. 310, n.1. He goes on to regret that the Judgment of the *Northern Cameroons Case* did not make this clear.

This is surely correct. And one might also add that contemplation of the difficulties in which many nations might find themselves, concerning the enforcement of a Judgment against a State refusing to comply, should be still less a ground, tacit or otherwise, for a decision not to adjudicate upon the merits of a case.

Having said this, one might also observe that political motivations on the part of one or more of the parties to a case is not in itself an argument for the Court to refuse to adjudicate. Indeed, the Court itself has said on a previous occasion that, so long as there was a legal question put to it for answer, it was not concerned with the motives which prompted the formulation of the question.²⁸ They did not transform the Court's task from a judicial one into a political one. And so it is with the South West African question. Certain persons have attempted, in supporting this Judgment, to suggest that which the Court itself has not — namely, that this is a solely 'political' dispute of which it should have no part: the Court did not, however, say this; clear legal claims were submitted to the Court, and the Court merely said that in respect of the 'conduct provisions' of the Mandate, no judicial recourse existed to individual states which lacked a 'special interest'. This is a different point, and one we have discussed above.

But in addition to these abstract considerations, the Court was faced with a discomfiting recent piece of history — it had given an Advisory Opinion on a highly-charged and controversial subject, namely, the question of UN expenses incurred in peacekeeping in Gaza and the Congo. It had pronounced on the legal issues, but the political rifts between nations had remained, and in spite of the 'acceptance' of the Opinion by the General Assembly, many states continued to ignore it. The Court can hardly have relished the prospect of becoming embroiled in the South West African controversy; and those who contributed to its lack of confidence in the compliance of nations with its Judgments and Opinions should feel some embarrassment in chastising the Court so roundly in the South West Africa case. The Soviet Union is a country in point. Indeed, other aspects of the criticism of this case are equally disquieting. Only a very few governments accept, without qualification, the jurisdiction of the International Court. Yet the citizens of many countries who do not accept the Court's jurisdiction, or accept it only under very limited conditions, feel no compunction in castigating the Court for declining to pronounce on exceedingly explosive matters affecting the vital interest of other states. These citizens have not, in the main part, been noticeably in the forefront of any campaign to get their own governments to assign more authority to the Court. If the

²⁸ *The Admission Case, ICJ Reports, 1948, at p. 61.*

nations of the world *really* want an International Court which will decide legal questions which may have highly political repercussions, then they must act accordingly and accept in advance, and on the broadest possible basis, the Court's legal right to settle disputes.

Even those nations which have been comparatively well disposed towards the concept of the judicial settlement of disputes, have made it fairly clear by their international conduct that a decision on the merits of the *South West Africa Case* would be highly embarrassing to them politically. If men send up smoke-signals, they must not be surprised if they are read. There has been too much propensity to assign blame elsewhere, and too little inclination to examine the cleanliness of one's own hands.

V. PROSPECTS FOR THE FUTURE

One is left with the question: what now? And that question embraces both the future of the Court and the future of South West Africa.

A. The Future of the Court

This Judgment of the Court has attracted much more lay interest than any other case which has come before it; and the reaction to it — outside of Southern Africa, in any event — has been largely hostile. The dismay expressed, sometimes in terms of great vehemence, has not by any means been limited to Africans. Criticism has also been widely voiced by white opponents of *apartheid* and by those who had hoped for a judicial role in the supervision of the Mandate. They have been joined in their criticisms by those who denigrate the significance of international law and who see the Court's Judgment as further proof of the irrelevance of international law in the contemporary world. Thus both those whose reaction is dismay and those whose reaction is cynical satisfaction are united in their response to the Court's Judgment. This is not to say that all the criticism directed at the Judgment is well founded. It is not, and much of it stems from an inadequate appreciation of the legal issues involved. But it nonetheless remains true that, outside of the parties directly involved there *has* been hostile reaction, and that this has by no means been limited to Africans. Nor is it a question of a united fellowship of international lawyers defending the Judgment against the attacks of unreasoning laymen. The unease is not confined to lay opinion, though the grounds on which it is based may differ as between lawyer and layman. Non-lawyers are proud to assume that 'international law' and 'international adjudication' are synonymous concepts, and accordingly, find in their disapproval of the Court an adequate reason for proclaiming that they 'no longer believe in international law' or that 'international law doesn't work'.

This sort of reaction, though psychologically interesting, is not very impressive because it is based on misconceptions. Litigation, followed by judicial decision, forms only a very small portion of the corpus of international law. Every single day, international law acts through a vast web of reciprocal rights and duties, as an effective restraint upon excesses in state behaviour and as a guide to orderly international intercourse. These rules of international law stem only in very small part from judicial decisions, being more commonly based on the alternative legal sources of custom and treaty. The person who thinks of the law of nations solely as collective sanctions pursuant upon a judicial decision is trapped in his own mythology.

But the international lawyer can gain little comfort from the fact that this particular response to the Court's Judgment is not well-grounded; for international law is based in essence upon consent — consent as evidenced by the granting of jurisdiction to a Court, by the permitting of a custom to evolve and by the acceptance of norms enunciated in a treaty. And consent necessarily presupposes confidence: and confidence has undoubtedly been undermined by the Court's decision.

We are not suggesting that the Court, in giving its Judgment, should have been guided by considerations of whether it would be 'well-received' or 'badly-received'. The Court, must, of course, give consideration solely to the law as it exists. But it does seem to this writer that there are objective grounds for anxiety that the Court has not in fact done so, and that, as Judge Jessup put it in his dissenting Opinion, it has given a Judgment 'completely unfounded in law'.²⁹

One of the most curious aspects of the whole affair has been the direction in which the anger of certain Western critics has been channelled. There have been demands for 'the reform of the Court', and for governmental action to ensure that 'such a judgment could not happen again'. Certain Western commentators have undoubtedly seen in such suggestions a possible method of attempting to remove the stigma which they now feel attaches to them in the eyes of the African nations. But this is hardly a liberal approach to the independence of the judiciary. If there were grounds for 'reforming' the Court, they must surely lie in evidence called from a series of judgments, not from the fact of one decision with which one does not agree (no matter with what good reason). It comes ill from those who declare that 'international law must be carried out' to suggest that tinkering with the Court in the matter of the selection of Judges is an appropriate way to achieve this objective.

There have been misgivings expressed about the fact that only

²⁹ *ICJ Reports 1966*, p. 323.

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the casting vote of the President tipped the balance; but it is virtually impossible to avoid all contingencies whereby the Court might be left with an even number of Judges at the end of a case; and a casting vote is thus necessary. Indeed, the clamour on this particular aspect is largely beside the point, and it is better to adopt Judge Jessup's view that it is not 'justifiable or proper to disparage opinions or judgments of the Court by stressing the size of the majority'. For an international community, which has shown little interest in 15 years' work by the Court, now to clamour for hasty procedural reform, in the wake of a decision of which it disapproves, is not a very praiseworthy spectacle.

By definition, Judges *ad hoc* sit on the Court only for the duration of the case for which they were appointed. Neither Judge van Wyk (who voted with the majority) nor Judge Sir Louis Mbanefo (who dissented) remain upon the bench of the Court. Of the other seven majority Judges, the terms of office of three have recently expired. The tenure of Judges Sir Percy Spender, Winiarski and Spiropoulos came to an end on February 5, 1967. So too did that of Judge Koo, who dissented. During the twenty-first session of the Assembly, elections were held to fill these vacancies. The members of the Court are elected by the General Assembly and by the Security Council (Article 4 of the Court's Statute). These two organs (with no distinction being made in the Security Council as between permanent and non-permanent members) proceed independently of one another to elect the members.³⁰ Those candidates who obtain an absolute majority of votes in both the General Assembly and the Security Council are deemed elected.³¹ It became inevitable that when the elections fell due in the autumn of 1966, the manner in which the Court disposed of this Judgment would introduce into the minds of the majority of the General Assembly the determination that white Commonwealth Judges should not be elected. The position of western European candidates would also be made more difficult. This indeed proved to be the case, and although this is neither the time nor place to analyse the election results, one may note that at least one distinguished candidate, who had had very high hopes of election, found that, after the Judgment on South West Africa, they could not be realized. The Judgment of the Court would seem to have put a nail in the coffin of the standard laid down in Article 9 of the Statute — namely, that the bench should represent the principal legal systems of the world and possess the highest conceivable qualifications of those nominated. In spite of the 'political' voting

³⁰ Article 8.

³¹ Article 10 (1). Provisions are also made for certain complications which may arise under this voting procedure.

procedure, it is a standard which till now has been widely upheld.

The balance³² of the Court was not radically altered by the 1966 elections (Judges Bengzon, Lachs, Onyeama and Petrèn were elected to the vacant seats, and Judge Ammoun succeeds himself for a second term). However, there was some unmistakeable writing to be seen on the wall, and if the present weighting and standards do drastically alter, it is possible that the older nations — those nations who have hitherto made most use of the Court — will become less and less inclined to submit to international adjudication. The comparatively few cases which come before the Court could well dwindle further in number. The Court has before it at the moment only the second phase of the *Barcelona Traction Case*, though it is possible that Japan and New Zealand may go to the Court over their fisheries dispute, and Denmark, Holland and Germany over their dispute on the continental shelf. The United Kingdom government has undoubtedly been motivated in its offer to put the Gibraltar question before the Court, by a desire to support the Court at this critical juncture, as well as by other considerations. The offer was not accepted by Spain.

As for the developing nations, they will be less inclined than ever to use the Court, even if the composition of the Court becomes markedly less European. Complete antagonism to the International Court, and to the employment of legal means to resolve disputes, is likely to result. International lawyers have been faced with the problem of a marked disinclination by the newer nations to resolve their disputes by use of the Court. (Though the ostensibly wider acceptance of the jurisdiction of the Court by the western nations is illusory to the extent that far-reaching reservations to such acceptance are not uncommon). Many of the developing countries have felt that the Bench was basically of a pro-Western disposition, and that in any event it would be applying a law which was formed without their participation and which frequently runs against their interests. Western international lawyers have devoted considerable energies to proclaiming the universality of international law, indicating methods by which the new nations can participate in its development, and to urging the advantages of international adjudication. If one is honest, one must admit that *any* decision in favour of South Africa — including one based on the major substantive issues of the case — would have occasioned widespread hostility to the Court in Afro-Asian Countries. But Western lawyers could in conscience have pointed out that the International Court is the highest Court in the

³² Australia, China, Poland, Lebanon, Greece, United Kingdom, U.S.S.R., Japan, Peru, U.S.A., Italy, Pakistan, Mexico, Senegal and France in July 1966; with nationals from the Philippines, Sweden and Nigeria, replacing those from Australia, Greece and China in February 1967.

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world, and that it had given a binding Judgment, which must be respected, on exceedingly complex points of law. They could also have asserted that an unfavourable Judgment upon a particular issue does not negate the overall advantages of international adjudication.

Both the manner in which the Court disposed of the case, and, to a lesser degree the grounds upon which it did so, make it far from easy to embrace this plea with any enthusiasm. One is now required to promote a system whereby years of legal argument and expense will not necessarily lead to a pronouncement on the substantive issues, even though the Applicants had reason to believe that all questions concerning their right to obtain a Judgment had already been settled. Any evangelism for use of the Court is likely to wane sharply. If a large number of Western observers see the Judgment as an attempt to dodge uncomfortable questions, then an even larger number of Africans see it as a denial by white men of the use of the legal process to the coloured nations. The prospects for the use of the Court — and the inadequate use of the Court has been a longstanding problem — are thus exceedingly gloomy; and the work to be done in expanding those areas where international rules are already accepted, and the hopes of building a universal legal order, have received a severe setback too. The very rough handling that the financial requirements of the Court received in the Fifth Committee of the Assembly was another indirect outcome of the South West Africa Judgment. The Budgetary Committee had been asked to approve an additional appropriation of \$ 72,500 for the Court, and this was rejected by 40 votes to 27, with 13 abstentions. This hampering of the efficient exercise of the judicial function is to be deplored, but the motives were clear enough — the Africans in the Committee pointed to the expenses they had incurred in a protracted litigation, only to hear that the Court could not pronounce on the merits.³³

(b) The Future for South West Africa

(i) *What is the law on the South West Africa Mandate?*

Some confusion has arisen on this question, because among the claims put before the Court was a cluster of requests for the Court to reaffirm, in this binding Judgment, points which it had already made during the course of its Advisory Opinions of 1950, 1955 and 1956. The aim, clearly, was to give the quality of legally binding decisions to points which had previously ranked as Advisory Opin-

³³ And see *The Times* leader 12 Oct. 1966, which is not unsympathetic to the African viewpoint.

ions. Thus the Court was asked to declare that South West Africa was a territory under Mandate; that the Mandate was still in force; that South Africa remained subject to the obligations in the Mandate, and in Article 22 of the League Covenant; that the UN was legally qualified to exercise the supervisory functions previously exercised by the League of Nations; and that South Africa was legally required to submit an annual report to the United Nations and to transmit petitions from the inhabitants of the territory of South West Africa.

The Court, by declining to pronounce upon the merits of this case, has also declined to pronounce on these points, though all of them form part of the jurisprudence of the Court through its earlier Advisory Opinions. Indeed, the continued existence of the Mandate had been, incidentally but fairly clearly, assumed by the Court in the Judgment of 1962.

The correct answer on these points would seem to be that the affirmative pronouncements by the Court in 1950, 1955 and 1956 remain authoritative — despite the fact that the Court declined to pronounce on these questions, as well as on other claims concerning the alleged breach of the Mandate and of a norm of international law. The Court regarded its present judgment as ‘without prejudice’ even to the continued existence of the Mandate — the most basic of matters, pronounced upon affirmatively in 1950, and from which all else flows.

In logic, it seems inevitable that once the Court found that Ethiopia and Liberia had no legal standing which would entitle them to obtain a Judgment from the Court, the Court was obliged not to reply on any of the substantive points raised by the Applicants. Nonetheless, one may feel with Judge Jessup that it is one of the unfortunate repercussions of this Judgment that

‘In the course of three Advisory Opinions rendered in 1950, 1955 and 1956, and in its Judgment of December 21, 1962, the Court never deviated from its conclusion that the Mandate survived the dissolution of the League of Nations and that South West Africa is still a territory subject to the Mandate. (But) By its Judgment of today, the Court in effect decides that Applicants have no standing to ask the Court even for a declaration that the territory is still subject to the Mandate’.³⁴

Certain South African publications have sought to suggest that, in any event the Judgment meant that the Mandate was ‘in effect, dead’. The Court in 1950, and again 1962, emphasized that South Africa’s rights in the Territory depended upon the continued existence of the mandate. South Africa’s attitude towards the continuation of the mandate has in consequence been somewhat ambiguous. South Africa sought to deny both the competence of the Court (in 1962)

³⁴ *ICJ Reports 1966*, p. 327.

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and her own legal obligations (in 1966) on the grounds, *inter alia*, that the mandate no longer existed. But — perhaps bearing in mind the Court's dictum on the relationship between South Africa's rights and the continuation of the mandate — she advanced an alternative argument, namely that even if the mandate existed, there was no supervisory organ in respect of it. (See Clause 2a of South Africa's Counter-Memorial, *ICJ Reports 1966*, p. 14). This argument, of course, was the one which Judge McNair had advanced in 1950, and was among those supported by Judges Fitzmaurice and Spender in their dissent in 1962.

In his first speech before the General Assembly, on September 26, 1966, Mr. D. P. de Villiers, S.C., merely stated that the survival of the Mandate was a question which, because of the terms of the 1966 Judgment 'was therefore left open' (p. 4, Official text issued by South African Mission to the UN). In a subsequent speech, however, the South African representative, faced with the prospect of an attempt by the Assembly to revoke the mandate, declared that South African rights in South West Africa were not contingent upon the mandate, but flowed from *rights of conquest*. Given the whole purpose of the mandates system, this claim is of very doubtful legal validity. Whereas the law on the compatibility of *apartheid* with the Mandate, and with general international law, remains uncharted, the pronouncements of the Court in its earlier Advisory Opinions on the continued existence of the Mandate, and rights and duties thereunder, remain authoritative. Legally, the Mandate continued in existence at least until the General Assembly Resolution, last October, revoking it, and South Africa and the United Nations thus retained their respective rights and obligations thereunder.

(ii) *Revocation of the Mandate*

A foreseeable consequence of the Judgment was a strong campaign for the revocation of the Mandate. It had the attraction of being one of the few untried approaches in the South West Africa controversy, and the Afro-Asian states were bound to urge that the Court's Judgment was a clear indication that only political action would achieve any progress. They pointed to South Africa's long history of non-co-operation with the UN over the Mandate (a history which antecedes by a decade the emergence of large numbers of new African states and their membership of the UN), and insisted that the time had now come for South Africa to be deprived of the Mandate.

We are here, in many ways, at the heart of the matter. Although South West Africa has long been a matter of considerable concern to the United Nations, the latter's major preoccupation has been with the whole question of *apartheid*. The implementation of the Mandate has been seen as inextricably woven in with the wider

problem. The protection from intervention which the Charter affords states on matters of purely domestic policy (though a limited exception is to be found in the human rights provisions of Articles 55 and 56) has made it extremely difficult to mount effective international opposition to *apartheid* in South Africa. But specific international obligations attach to the South West Africa Mandate, and it was seen as a possible inroad into the whole question of *apartheid*. Impatient Africans had long been assured by most Western countries that they, too, deplored *apartheid*; but, it had been correctly explained, such a policy did not make South Africa liable to collective sanctions under international law. The possibility of instituting litigation over South West Africa presented the African states with the chance of having behind them — albeit only in reference to the Mandated Territory — a judicial order to desist from the practice of *apartheid*; and it was felt that this was an authority which the Western Powers, with their traditional respect for the judicial process would find politically very embarrassing not to support. In other words, the Africans hoped that a decision in their favour would force the hands of the United Kingdom and the United States in the Security Council.

But there was from the start a confusion as to objectives, for while on the one hand the Africans sought a judicial determination on the proper implementation of the Mandate, what they *really* wanted was no Mandate at all. This dichotomy between what they thought prudent to seek from the Court — the effective carrying out of the Mandate — and what they at heart ultimately hoped for — independence for South West Africa — became inevitable after the passing of General Assembly resolution 1514 in 1960, on the Granting of Independence to Colonial Peoples. In other words, the point had already been reached by 1966 whereby the weight of African political activity was directed towards independence, and not towards the full and effective implementation of the Mandate.

But the Court's Judgment — even if it had gone completely in favour of Ethiopia and Liberia — would have provided no legal grounds for a demand for independence for the territory.

A plea for revocation of the Mandate, therefore, would in this writer's opinion only have been postponed by a Judgment on the merits of the case. It was bound to come in a few years anyway. But revocation does present a great dilemma, both legally and politically. Legally, everything the Court has said between 1950 and 1962 concerning South Africa's obligations and the UN's authority as a supervisory body rests on the continued existence of the Mandate in its present form. One puts some 12 years of consistent jurisprudence in jeopardy if the status of the Mandate is now altered, for it is not entirely clear that the legal rights held by the UN under the

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Mandate would remain the same. Moreover, in 1950 the Court declared that the competence to 'modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations'³⁵. This answer was, it is true, given in reply to a query as to whether South Africa could alter unilaterally the status of the Mandate, or if not, where such authority lay: but it is hardly clear evidence of competence of the Assembly to revoke the Mandate unilaterally.

A party may legitimately invoke a material breach of a treaty as a ground for terminating the treaty or suspending its operation in whole or in part. A 'material breach' consists of the violation of a provision essential to the accomplishment of the object or purpose of the treaty. (See Article 57 of the International Law Commission's recently adopted articles on the law of Treaties). But, in respect of the Mandate, several points arise: first, there still exists no clear judicial pronouncement that South Africa is in breach of fundamental obligations which are essential to the purpose of the Mandate. The Advisory Opinions did not address themselves, in so many words, to whether South Africa was in breach of the Mandate: they sought to clarify the rights and duties at issue. Moreover the Court has at no time indicated that the Mandate prohibits *apartheid*, still less that South Africa is thus in material breach of the Mandate. This is not to say that the initial right to invoke a material breach as grounds for terminating a treaty depends upon a prior judicial pronouncement: it is merely to point, in a world in which unilateral denunciations of international commitments are all too common, to the desirability of such judicial authority. Second, doubts exist as to whether the United Nations is in fact a 'party' to the Mandate, in the sense of possessing such contingent rights of termination. It is perhaps arguable that the only authority it has, is in respect of supervision of the Mandate. And third, it is not entirely clear that ordinary treaty rules apply to the Mandate, because in addition to being a treaty, it is an instrument *sui generis*, establishing a 'sacred trust' and a right *in rem*. Neither the terms of the Mandate nor Article 22 of the League envisage revocation as a sanction available for non-fulfilment of the Mandate by the Mandatory. The revocation of a Mandate may require additional considerations over and above the guiding rules of treaty law.

All these are very real problems. Yet at the same time the Assembly has been extremely mindful of its impotence, because of South African non-co-operation, as an effective supervisory body. It was faced, in the autumn of 1966, with the unhappy choice between

³⁵ *Advisory Opinion on the Status of South West Africa, ICJ Reports 1950, p. 143.*

continuing with the previous well-tried, but ineffectual pattern, or endeavouring to strike out in a new direction — albeit one overlaid with certain legal obstacles. In the General Assembly debates the vast majority of nations did not in the opinion of this writer, address themselves adequately to the legal problems mentioned above. There was no serious analysis of the competence of the Assembly, in respect of altering the Mandate. For a small group of nations, however, these questions — among others — undoubtedly presented grave problems. Not only should the legal complications have been acknowledged, but political misgivings were also felt, because it was far from easy to see the advantage of taking action which was unlikely to lead to effective results. It was felt by these countries that an Assembly resolution would be a revocation in name only; for, without South African approval, a UN administration for the Territory would be a mere paper plan. Further, the revocation of the Mandate seemed just that sort of open-ended policy in South Africa which most western nations had been so intent on avoiding: the reactions from South Africa were unpredictable, the extent of the commitment unassessable, and the pressures for escalation very considerable. At the same time, those western nations who had proclaimed their dislike of *apartheid* were under very heavy pressure in the Assembly: and the Court's Judgment of 1966 made that pressure all the greater. The United Kingdom's position was especially difficult, in the light of its failure to end the rebellion in Rhodesia, its traditional interests in southern Africa, and its genuine desire to see an effective implementation of the Mandate.

In a carefully measured speech Lord Caradon, the British representative, told the Assembly that, contrary to the South African assertions, the 1950, 1955 and 1956 Advisory Opinions stood unimpaired. South West Africa remained a territory under Mandate, and South Africa's obligations continued also. Lord Caradon then took up what was in effect a theme that Judges McNair and Read had pursued in the Advisory Opinion of 1950 — that South Africa's rights in South West Africa were concomitant with her obligations, that the authority which she had been given in the Territory was for the purpose of being able to carry out her duties under the Mandate.

At the heart of her duties, ran the United Kingdom argument, was international accountability, in the form of reports to UN, and the transmission of petitions. This led the British representative to a conclusion which marked a radical departure in British policy:

'(The South African Government) cannot deny their essential obligations under the Mandate without forfeiting whatever rights they have acquired in relation to the administration of the Mandate. They no longer have the right to carry the sacred trust conferred upon them'.

Thus the emphasis is on the lapse of South Africa's rights,

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rather than on formal revocation of the Mandate; and on accountability (upon which the Court *has* pronounced) rather than *apartheid* (upon which it has not). It was therefore the British view — and the United States one — that detailed study, on the legal, political and administrative levels should go forward to see how to achieve the declared objective. Lord Caradon felt that a detailed spelling out of the UN's legal and practicable role in the administration of South West Africa was necessary before the Assembly declared South Africa's rights in the territory forfeited. When the Resolution to terminate the mandate was debated, the United States tried to introduce an amendment to this effect, without success. The United Kingdom for this reason abstained on the resolution — in spite of the very strong speech by its representative — though the United States joined those nations voting in favour of the resolution:

General Assembly Resolution 2145 (XXI)

The General Assembly,

Reaffirming the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations, General Assembly resolution 1514 (XV) of 14 December 1960 and earlier Assembly resolutions concerning the Mandated Territory of South West Africa,

Recalling the advisory opinion of the International Court of Justice of 11 July, 1950, accepted by the General Assembly in its resolution 449 A (V) of 13 December 1950, and the advisory opinions of 7 June 1955 and 1 June 1956 as well as the judgment of 21 December 1962, which have established the fact that South Africa continues to have obligations under the Mandate which was entrusted to it on 17 December 1920 and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa,

Gravely concerned at the situation in the Mandated Territory, which has seriously deteriorated following the judgment of the International Court of Justice of 18 July 1966,

Having studied the reports of the various committees which had been established to exercise the supervisory functions of the United Nations over the administration of the Mandated Territory of South West Africa,

Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of apartheid and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity,

Emphasizing that the problem of South West Africa is an issue falling within the terms of General Assembly resolution 1514 (XV),

Considering that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

ROSALYN HIGGINS

Mindful of the obligations of the United Nations towards the people of South West Africa,

Noting with deep concern the explosive situation which exists in the southern region of Africa,

Affirming its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory.

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations.

2. *Reaffirms further* that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence.

3. *Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate;

4. *Decides* that the Mandate conferred upon his Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

5. *Resolves* that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;

6. *Establishes an Ad Hoc* Committee for South West Africa — composed of fourteen Member States to be designated by the President of the General Assembly — to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967;

7. *Calls upon* the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatsoever alter or tend to alter the present international status of South West Africa;

8. *Calls the attention* of the Security Council to the present resolution;

9. *Requests* all States to extend their whole-hearted co-operation and to render assistance in the implementation of the present resolution;

10. *Requests* the Secretary-General to provide all assistance necessary to implement the present resolution and to enable the *Ad Hoc* Committee for South West Africa to perform its duties.

The resolution was adopted by 114 votes in favour, to 2 against (South Africa and Portugal), with Malawi, France and the United Kingdom abstaining, and Botswana and Lesotho absenting themselves. To this writer, the import of the resolution is far from clear; on the one hand, it is reaffirmed that South West Africa shall have an 'international status' until independence; on the other hand, it decides that the Mandate is terminated. An attempt is made to bridge these concepts, by resolving that the United Nations must discharge

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South Africa's former responsibilities to the territory, though the legal basis is not specified, nor is the appropriate organ. One can do no more than say that intractable problems are being dealt with pragmatically, and clarity is not always desirable, or possible, in the pragmatic approach.

In November 1966, the *Ad Hoc* Committee provided for in the resolution was set up, comprising Canada, Chile, Czechoslovakia, Ethiopia, Finland, Italy, Japan, Mexico, Nigeria, Pakistan, Senegal, U.S.S.R., the United Arab Republic and the United States. The United Kingdom declined to serve. The report of this Committee will mark the next stage of the South West Africa problem. The ripples flowing from the Court's Judgment in July 1966 are likely to continue for some time yet.

(iii) *The possibility of an Advisory Opinion*

It was in theory at least, still open to the General Assembly to request of the Court an Advisory Opinion on those legal claims upon which Ethiopia and Liberia's case rested. That is to say, the Court could have been asked to confirm the continued existence of the Mandate, the UN's supervisory role, and South Africa's obligations thereunder. The Court could also have been requested to advise as to whether *apartheid* is contrary to Article 2 of the Mandate, and contrary to a norm of general international law. It would seem that, in an Advisory Opinion, the Court could *not* properly be asked — as it had been in the 1966 case — to issue an order to South Africa to 'desist' from such of those actions as the Court might find contrary to the Mandate or international law. The advisory jurisdiction of the Court does not extend beyond mere advice as to what the law is³⁶; the authority to command specific action from a state, as a consequence to its determination of the law, is available only in contentious cases between states. But the Court could nonetheless have been asked by the Assembly to give judicial pronouncement on certain of the substantive issues in respect of which it declined to give an answer to Ethiopia and Liberia. Such an opinion would not be legally binding, it is true; and it could be argued that it would take one no further forward. This is not entirely correct, however, and for two reasons. First, the Court has only been asked, in previous Advisory Opinions, questions relating to the system of international supervision of the Mandate — it has confirmed that the Mandate exists, and that the Assembly is entitled to annual reports and the transmission of petitions. The Court has not hitherto been asked to

³⁶ Article 96 of the UN Charter provides: 'The General Assembly or the Security Council may request the International Court of Justice to give an Advisory Opinion on any legal question'.

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pronounce upon legal aspects of the Mandate which are not directly linked to the question of UN supervision. A request for legal guidance as to the compatibility of *apartheid* with Article 2 of the Mandate would thus be breaking new ground. Secondly, the Court, while it has confirmed that certain rights and obligations continue to exist under the Mandate, has not been asked to declare that South Africa is in breach of her obligations. (Certain *obiter* pronouncements in this respect have been made by particular Judges, but the Court itself has previously been asked to clarify the law, not to proclaim South Africa in breach of it). Thus a request to the Court to advise whether, in failing to enter reports, transmit petitions, and in introducing *apartheid* into South West Africa, the Union is in breach of its legal obligations, would also be breaking new ground. From the viewpoint of the Afro-Asian states, a clear pronouncement on these questions could be an advantage, for Western political opinion could more easily be mobilised, if the Court advised that South Africa was in breach of her international legal obligations. The legal issues would be clarified and this in itself could be of significance on the political level.

It was extremely unlikely, however, that the Afro-Asian states would want to avail themselves of this method of proceeding. They feel bitter and hostile towards the Court, and their emotional reaction is to have no more part of it. Their suspicion of the judicial process now greatly outweighs the possibility that an Opinion on the substantive merits of the case might have effectively upheld the claims which Ethiopia and Liberia have advanced. This is so, even though the request for an Opinion might come before a Court whose composition had somewhat changed — and which, even if it had not, had in no way rejected (or approved) their substantive claims. Moreover, even those Africans who are prepared to admit privately that they can see certain advantages in asking for an Advisory Opinion feel that their domestic reputation as 'nationalists' does not allow them publicly to embrace this now. It should be added that they are by no means alone in their reactions — the response of many Western persons to the surprising Judgment of the Court has been to denounce any suggestion of further recourse to the Court, and to insist that henceforth things proceed solely on the political level.

It is also widely assumed that to ask for an Advisory Opinion would entail once again a judicial process of years and years. In fact, this would be most unlikely — the Court's record on speediness in respect of Advisory Opinions has been quite impressive (no doubt it has borne in mind the relevance of such Opinions to the annual timetable of the UN); and if the Court were asked to give its Opinion on the basis of evidence already laid before it in the contentious pro-

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ceedings of 1960-66, this would probably allow an Opinion to be handed down in a few months. One suspects, however, that the Afro-Asian states are no longer interested in such arguments.

All talk of an Advisory Opinion has been rendered somewhat academic by the resolution passed by the Assembly, however. The Court might well feel that the terms of that resolution were not consistent with a request for an Opinion on questions concerning the continuation of the Mandate and obligations flowing therefrom. The Court would further, it may be thought, be faced with the concept of 'mootness' (as it had been in the *Northern Cameroons Case*, *ICJ Reports*, 1963). It is difficult to disagree with Rosenne's general observation that "A request for an Advisory Opinion on a 'moot' question would undoubtedly raise the issue of propriety in an acute form"³⁷. There is certainly ample evidence that the Court possesses a discretion to refuse to give an Advisory Opinion.³⁸

The Court could, of course, be asked to state whether the Assembly has acted within its competence in adopting resolution 2145 (XXI), and what the legal effect is of that resolution. This would be a perfectly proper question to address to the Court, but political considerations make it highly unlikely that it will be asked.

³⁷ Rosenne, *The Law and Practice of the International Court*, Vol. II, p. 705.

³⁸ For the nature and scope of this discretion, see Rosenne, *op. cit.*, Vol. II, pp. 708-719; and Shihata, *The Power of the International Court to Determine its own Jurisdiction*, pp. 42-47.

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