DISSENTING OPINION OF SIR LOUIS MBANEFO

The Court in its Judgment 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 and that for that reason the claims must be rejected. I regret I find myself unable, for reasons which I shall hereinafter state, to agree with those conclusions and the motivation behind them.

I hold the view that when the Court has found that the dispute in the present cases is within the ambit of the compromissory clause, Article 7 (2) of the Mandate, as it did in its 1962 Judgment on the preliminary objections, the Applicants do not have to show again in order to succeed that they have individual legal interests in the subject-matter of the dispute unless their claims are founded on damage or prejudice to such interests; and secondly, that a general interest in the proper carrying out of the terms of a multilateral treaty like the Mandate is sufficient legal interest on which an applicant can found its claim.

The two Applicants, the Government of Ethiopia and the Government of Liberia, filed two separate but identical Applications against the Government of the Union of South Africa as Respondent, in which they ask the Court to adjudge and declare against the Respondent upon 11 (later reduced to nine in the final submissions) different heads of claims relating to the Mandate for South West Africa. The claims, as set out in the Applicants' final submissions, are reproduced in the Judgment of the Court and I do not intend to repeat them in full again.

Briefly they ask the Court to adjudge and declare that South West Africa is a territory under the Mandate, that the Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of the territory, and that the supervisory functions are to be exercised by the United Nations to which the annual reports and petitions are to be submitted. The Applicants further complain that the Respondent—

(a) has practised apartheid and, because of such practice, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory;

(b) has failed to transmit petitions from the inhabitants of the territory to the United Nations;

(c) has failed to submit annual reports to the General Assembly of the United Nations;
(d) has established military bases within the territory;
(e) has attempted substantially to modify the terms of the Mandate without the consent of the United Nations.

The Applicants say that these acts and omissions are in violation of the obligations undertaken by the Respondent as Mandatory under the Mandate and request the Court to declare that the Respondent has the duty to observe the terms of the Mandate and to cease doing the acts complained of.

It has been argued by the Respondent that the Applicants' final submissions, in particular Submissions Nos. 3 and 4, amount to a substantial modification of the Applicants' original submissions E, F, G, H and I as set out in their Applications. The Respondent says that the Applicants' original submissions made allegations of arbitrary, inhuman and oppressive measures against the Respondent, and that those allegations were withdrawn in the final submissions.

Submissions E, F, G, H and I as stated in the Applications read as follows:

> "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.
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> 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.
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> 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.
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> 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 power 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."

In their final submissions, the Applicants deleted the above five submissions and substituted Submissions 3 and 4 which read as follows:

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

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

The gravamen of the Applicants' complaint in both sets of submissions is the practice of apartheid which they say is, by its nature, oppressive, arbitrary and inhuman, and, therefore, incompatible with the Respondent's obligations under Article 2, paragraph 2, of the Mandate. That complaint has not changed and remains the same in the original as well as in the final submissions.

The facts relied upon by the Applicants in support of their Submissions 3 and 4 are certain laws, regulations and official measures introduced in the territory by the Respondent which are listed in the

Applications and amplified in the Memorials. A few of them may be mentioned here:

(a) The census classification groups the population as "*Whites*", "*Natives*", "*Coloureds*" and "*Asiatics*". *Whites* are defined as persons who in appearance obviously are, or who are generally accepted as white persons, but excluding persons who although in appearance are obviously white, are generally accepted as coloured persons. *Natives* are persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa. *Coloureds* are all persons who are neither Whites, Natives nor Asiatics. Applicants say that rights and burdens are allotted, by Government policy and actions, on the basis of membership in a racial group irrespective of individual quality or capacity.

(b) Natives are not entitled to obtain permanent residential rights or ownership in urban areas in the Police Zone. This restriction applies to any association, corporate or incorporate, in which a Native has any interest and relates to rural townships as well as urban areas.

(c) Probationary leases contain conditions providing for their immediate cancellation in the event of a lessee marrying a Native or Coloured person and prohibiting any transfer of the lease to Natives, Asiatics or Coloured persons.

(d) Within the area of the Police Zone, excluding the Native reserves and the Rehoboth Gebiet, licences to prospect for minerals may be issued only to Europeans and European-owned companies.

(e) In all mining enterprises owned by Europeans, Natives may not occupy any of the following posts: Manager; Assistant, Sectional or Underground Manager; Mine Overseer; Shift Boss; Ganger; Person in charge of boilers, engines and machinery; Surveyor; Engineer; Winding Engine Driver; Banksman or Onsetter.

(f) In the legislation in the territory relating to registration of trade unions and settlement of individual disputes there is no provision for the registration of Native trade unions and no provision for conciliation of disputes in so far as a Native employee is concerned. The provisions concerning labour disputes and conciliation do not apply to disputes among or between Native labourers and the others. A European Inspector represents the interests of Native employees in proceedings of conciliation boards, the members of which can be only Europeans or Coloured persons.

(g) It is a criminal offence for a Native employee to refuse to commence service under a contract of service at a stipulated time, to absent himself from his master's premises without leave or other lawful cause, to refuse to obey any order of his master or to leave his master's service with intent not to return thereto. An employee charged with any of the above may on conviction be sentenced to a term of imprisonment and on release from prison must return to his master's service unless the contract of service has been cancelled. If he fails to do so he may be sentenced to successive periods of further imprisonment, provided that no servant may be imprisoned continuously for longer than six months in all.

(h) Only Europeans may enter into contracts of apprenticeship in the territory.

(i) Only White persons are allowed to vote at an election of members of the Legislative Assembly. Non-Whites are excluded by law from serving as members of the Legislative Assembly, the Executive Committee or of the South African Parliament and excluded by practice from being appointed as administrators of the territory. No person other than a European may vote in any municipal council elections or qualify for election to a municipal council. According to the Respondent these are political institutions devised and intended only for the White population group. Native affairs at local government level are handled through Native Advisory Boards who possess no legislative or executive powers. Membership of local government institutions for Natives is shared equally between Natives and Whites.

(j) An authorized officer may, whenever he has reason to believe that any Native within an urban or a proclaimed area is an idle person, without warrant, arrest that Native and cause him to be brought before a Native Commissioner or Magistrate who shall require the Native to give a good and satisfactory account of himself and if the Native fails to do so, to declare him an idle person. If the Magistrate declares him an idle person he shall by warrant addressed to any police officer order that such Native be removed from the urban or proclaimed area and sent home or to a place indicated by the Magistrate and that he be detained in custody pending his removal.

(k) No unexempted Native may remain for more than 72 hours in an urban area unless permission to remain has been granted them by a designated person.

(l) An unexempted male Native over the age of 14 years is not permitted to travel beyond his place of residence or employment in the Police Zone unless he is in possession of a pass issued by an authorized person [the Police Zone is more than 50 per cent. of the whole Territory]. The pass must be produced on demand.

(m) An adult male Native who is not exempted must obtain a pass to leave the territory for the Republic of South Africa. This provision does not apply to White or Coloured inhabitants.

(n) Non-White persons working in urban areas in the Police Zone are restricted to segregated areas in the cities and buses and are not permitted to reside in what are considered to be "White" areas save on the premises of their employers in the White residential areas.

(o) The educational system of the territory is organized in three separate divisions, and the educational facilities and opportunities are made available according to whether the child is classified as "European", "Coloured" or "Native". This is in accordance with government policy of separate development in which the child's ability is never taken into account. A consequence of this system is that Native pupils are restricted to limited vocational training opportunities intended for members of the Native group. Opportunity for higher education virtually does not exist for the Native.

These facts and their sources are not in dispute between the Parties. The Applicants by the amendments say that as a matter of governmental policy they are, judged by acceptable international norms and/or standards, in violation of the Respondent's Mandate obligations. By doing so the Applicants were introducing a measure by which the conduct of the Respondent should be jugded. What the amendments have done is to bring out the essentially legal character of the dispute as one relating to the interpretation and application of the provisions of the Mandate. They have not in any material sense altered the basic complaint of the Applicants which is that the practice of apartheid is discriminatory, unwarranted, inhuman and, therefore, inherently and *per se* incompatible with, and in violation of, Article 2, paragraph 2, of the Mandate. The obligation of the Mandatory under Article 2, paragraph 2, of the Mandate to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory is in terms mandatory and any action of the Respondent with respect to the Territory must be judged in that light.

I think it convenient to say straight away that I hold the view that the Applicants have established sufficient legal interest in the subject-matter of the claim to entitle them, on the evidence before the Court, to succeed in some, if not all, of the claims; in particular, I hold that the following claims have on the evidence and the law been established and that the Court should have pronounced favourably on them:

(a) that South West Africa is a territory under the Mandate assumed by the Respondent on 17 December 1920;

(b) that the Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa;

(c) that the policy of apartheid is inherently incompatible with the mandate obligations of the Respondent and that the Respondent by practising apartheid has violated its obligations as stated in Article 2, paragraph 2, of the Mandate;

(d) that the Respondent is legally bound not to modify or to attempt to modify or to terminate the Mandate without the consent of the United Nations;

(e) that the Respondent is accountable to the United Nations for the proper discharge of its obligations under the Mandate and that the United Nations has a corresponding right of supervision;

(f) that the Respondent has a legal obligation to report to the United Nations.

I have stated my conclusions on some of the Applicants' submissions without going into the argument urged against or in support of them or giving my reasons for so finding, because I feel that it is on the basis that the claims, or some of them, at any rate, are established or are not unfounded, and in that context, that one can in the merits phase of the cases legitimately proceed to deal with the question of Applicants' legal interest and of the applicability of Article 7 (2). Both Parties have gone into a great deal of trouble and expense to bring all the facts and arguments relied upon by them before the Court in sittings lasting 100 days and it would have been more rewarding to them if the Court had stated its views or conclusions on the allegations. As the Court has not considered these claims I have reserved the reasons for my findings on them and shall, in this opinion, confine myself to dealing with the points on which I disagree with the Court's Judgment.

I feel rather unhappy about the Court's analysis of the mandates system. It pays little attention to the ideals of the Mandate and devotes a disproportionate amount of space to details. The approach, if I may be permitted to draw an analogy, is like that of an artist who, perhaps unconsciously, has distorted the appearance of a building by over-emphasizing details of sections of it. The emphasis, it seems to me, should be on the appearance and framework and not on the components, some of which might not be necessary to support or characterize the building.

In its Judgment the Court begins with two fine but in my view unnecessary distinctions: firstly, a distinction between the Applicants' standing in the present phase of the proceedings and their standing before the Court itself and says that the latter was the subject of the Court's decision of 1962. This distinction ignores the fact that the Applicants' standing before the Court dealt with in the 1962 Judgment was in respect of the same dispute which the Court has to decide in the present phase of the proceedings. The Applicants in respect of that dispute have no two standings before the Court. The need to establish a

substantive right or legal interest in the merits phase of the case will, in the circumstances of the present case, arise only if, as a matter of evidence, it is necessary for proving any item of the Applicants' claims. That is not the case here where the Applicants have claimed no damages and where their request is for a declaratory judgment. The question of Applicants' interest was treated by the Parties and by this Court in 1962 as an element of the issue of the capacity of the Applicants to invoke the compromissory clause in respect of the present dispute. The Court in the present Judgment, although it says that the question of Applicants' legal interest is an issue on the merits, deals with it in the context of the scope and applicability of Article 7 (2)—an approach which relates more to admissibility than to the merits.

Secondly, the Court draws a distinction between what it terms "conduct" and "special interests" provisions of the mandate instrument, and imports the distinction into its interpretation of Article 7 (2) of the Mandate. Article 7 (2) is a compromissory clause and does not, as it stands, permit of any such distinction. To do so, as I shall show later, is to do violence to the actual words of the text and is in the circumstances impermissible.

The Court's interpretation of the Mandate, pursued to its logical conclusion, leaves the Mandatory without any enforceable obligations except in relation to Article 5 of the Mandate. It is stated in the Judgment that it was never contemplated that the Council of the League should ever impose its views on the Mandatory or that the "conduct" clauses should be subject to adjudication under the compromissory clause of Article 7 (2). On that view the Mandatory could become as intransigent as it wished, and could ignore the decisions of the Council of the League and even modify the terms of the Mandate without any legal sanction. The only legal sanction envisaged, according to the Judgment, is in respect of what it calls "special interests" provisions. The Respondent had the right under the Covenant of the League to participate in the proceedings of the Council of the League, when the latter was dealing with matters appertaining to the Mandate for South West Africa and could thus paralyse the proceedings of the Council by the use of its right of veto. It is no answer to say that this had not happened throughout the League's existence. The fact is that it could have happened and, if it did, the legal consequences would have been, in the Court's opinion, as stated in the Judgment. A consequence of the Court's interpretation, if all the Council has to do is to use persuasion on the Respondent, would be to place the Mandate, juridically, on the same plane with annexation, the very thing that was condemned by the Peace Treaties, and which the Principal Allied and Associated Powers wished to avoid by the creation of the Mandates. If the view expressed in the Judgment was what the Principal Allied and Associated Powers had in mind when they set up the mandates system and agreed to Article 7 (2) of the Mandate for South West Africa, then the operation would appear to look

like a form of chicanery practised on mankind in the name of civilization —a subterfuge "intended to avoid, through its operation, the appearance of taking enemy territory as spoils of war". I do not, however, believe that that was so and, for that reason, I feel I cannot associate myself with the Court's interpretation of the Mandate.

This Court in its Advisory Opinion of 1950 on the *Status of South West Africa* said of the Mandate (p. 132):

> "The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants."

And again in 1962 in its Judgment on the preliminary objections the Court stated (p. 329):

> "The essential principles of the Mandates System 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 consider the idea of the sacred trust of civilization given juridical expression in the mandates system and, in particular, in the "conduct" clauses, more important and more deserving of judicial protection than the "special interests" of members of the League. Speaking juridically such concepts as "rights", "duties" and "obligations" have no meaning or effect unless they are legally cognizable, and enforceable in a court of law.

A rigid distinction is drawn in the Judgment between the League and its members. I do not think that the distinction need be so rigid. The League is the aggregation of its members and when it takes a decision it does so on behalf of and in the interest of its members. Strictly speaking the League vis-à-vis the mandates system should have no interest different from that of its members.

The League may, in a sense, therefore, be likened to a members' club (and here I have in mind the common law concept of such clubs). Any

member of a club can sue for the club's properties and can by appropriate action restrain the officers of the club from acting contrary to the aims and purposes of the club. A member can even proceed against an agent of the club or a third person in order to protect or recover the club's property where the officers of the club fail to do so. That, however, does not mean that the club cannot legally act as a body through its executive or trustees, or that it has ceased to possess a separate function. If the analogy of a members' club is in that limited sense accepted, I do not see anything extraordinary in the provision of Article 7 (2) of the Mandate allowing a member of the League to refer to court any dispute with the Mandatory, whether or not it relates to what the Court calls the "conduct" or "special interests" provisions relating to the interpretation and application of the provisions of the Mandate, especially as by Article 34 of the Court's Statute the League, not being a State, could not itself be a party to an action in the International Court. Only States or members of the League could be parties in cases before the Court.

It is clear both from the Applications and from the submissions that the Applicants' claim was of a declaratory nature. The Applicants have never alleged that they suffered any individual loss or damage and have not asked the Court to assess any damages in their favour. It is important to bear this in mind when dealing with the question of substantive rights or *legal interest* of the Applicants as an issue on the merits in the present cases.

No issue was raised in the final submissions of the Parties in the present phase of the proceedings regarding the non-existence of a legal interest appertaining to the Applicants in the subject-matter of the dispute. The Applicants in their oral argument regarded the issue of legal interest as settled by the 1962 Judgment on the preliminary objections. The Respondent referred to it in Book II of the Counter-Memorial, Chapter V, Part B, only in connection with the scope and purpose of the compromissory clause and in the context of the lapse of the Mandate as a whole. The argument in support of that thesis was largely a verbatim repetition of the argument advanced in Chapter V of its Preliminary Objections in support of its third preliminary objection. To emphasize that the issue was raised only in the context of the lapse of the Mandate, the Respondent at the end of Book II of the Counter-Memorial makes the following submissions:

> "For the reasons hereinbefore advanced, supplemented as may be necessary in later stages of these Proceedings, Respondent, as far as this portion of its Counter-Memorial is concerned, prays and requests:
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> *(a)* that all of Applicants' Submissions 1 to 9 be dismissed, on the ground that the Mandate for South West Africa lapsed *in toto* upon dissolution of the League of Nations;

(b) alternatively, and in the event of the Honourable Court finding that the Mandate for South West Africa is still in existence: that Applicants' Submissions Nos. 7 and 8 be dismissed, as well as their Submission No. 2 in so far as it relates to petitions, annual reports and supervisory functions, on the ground that Respondent's former obligations to report and account to, and to submit to the supervision of, the Council and the League of Nations, lapsed upon dissolution of the League and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body." (Counter-Memorial, Book II, Chap. VI, p. 257.)

Likewise in their final submissions, the Respondent raised no issue as to lack of substantive rights or legal interest of the Applicants in the subject-matter of the claim. The Parties placed before the Court in their submissions the basic points of difference—the real issues—between them for decision. That being so, the question might well be asked whether it is open to the Court, of its own motion, to raise as a point for decision on the merits an issue not raised by the Parties in their final submissions. No reason has been given by the Court in its Judgment for adopting such a course. This is particularly important since the question of Applicants' legal interest is not an issue for decision upon the evidence required in support of any of the claims in the Applicants' final submissions. The Respondent has throughout regarded the question of Applicants' legal interest as an issue relevant in the context of the scope and applicability of Article 7 (2) of the Mandate, and as such an issue of admissibility. It was in that respect that the issue was raised and decided in the 1962 Judgment.

In the Judgment of the Court in the present phase of the proceedings it is stated that the issue before the Court in 1962 was essentially one of the capacity of the Applicants to invoke the jurisdictional clause and that the only test of capacity predicated by this clause, the only qualification required by it to be fulfilled *ratione personae*, was that the Applicants should be members of the League. The Court, in my view, went further than that, as indeed it was required to do by the Respondent's submissions, and held that the dispute before it was within the ambit of the jurisdictional clause, *ratione materiae*. The nature of the dispute appeared clearly in the Applications and it was on that basis that the Respondent filed its preliminary objections.

The Applications were filed on 4 November 1960 and were duly served on the Respondent. On 30 November 1961 within the time-limit fixed for the formulation of its first pleading, the Respondent filed preliminary objections. The proceedings on the merits were accordingly suspended by virtue of the provisions of Article 62, paragraph 3, of the Rules of Court. The fact that the proceedings were so suspended did not and

could not in my view effect the binding force of the 1962 Judgment (which has not been challenged) on the issues raised in the submissions and decided by the Court.

In dealing with the 1962 Judgment it will be helpful to set out in full the grounds of the Respondent's preliminary objections as stated in its final submissions. They were that the Applicants—

> ". . . have no *locus standi* in these contentious proceedings, and that the Court has no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the Applications and Memorials, more particularly because:
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> *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—
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> *(a)* with respect to the said Mandate Agreement as a whole, including Article 7 thereof, and
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> *(b)* in any event, with respect to Article 7 itself;
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> *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;
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> *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;
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> *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 Applicants joined issue with the Respondent on all the points raised in the submissions.

In dealing with the preliminary objections the Court had two courses open to it under Article 62, paragraph 5, of the Rules of Court. It could either give its decision on them or join the objections or any of them to the merits. The Court chose the first course and gave its decision on all the objections raised by the Respondent in their submissions. In doing so it was unavoidable, having regard to the nature of the objections and the manner in which the Respondent presented its arguments, that it would touch on points which are also relevant to the merits of the case, e.g., the survival of the Mandate. In my separate opinion on the preliminary objections I said that a great deal of the argument on the first three preliminary objections in the Judgment

went to the merits of the case. But the fact that it was so did not detract from the effect of the Judgment of the Court on the issues decided. It only meant that whatever the Court found in that phase of the proceedings should not prejudice its findings subsequently on any issue relevant to the merits. The question of Applicants' legal interest was raised as an issue of jurisdiction, the submission being that the dispute was one in which neither the national interest of the Applicants, nor that of their own nationals was prejudiced, and consequently, that it was not covered by the compromissory clause of Article 7 (2) of the Mandate. The Court and the Parties regarded it, as in truth it was, as an issue of jurisdiction and treated it as such.

On the facts and law before it the Court rejected all the Respondent's objections and found that Article 7 (2)—

> "... refers to any dispute whatever relating not to any one particular provision or provisions, but to 'the provisions' of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and import 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.)

That was the finding of the Court on the scope and applicability of Article 7 (2) of the Mandate and remains so today.

It is said in the Judgment of the Court that this is a finding which goes not to the issue of jurisdiction but to the merits of the case and was in consequence irrelevant to the decision. The question of jurisdiction under Article 7 (2) of the Mandate has two aspects; one aspect is the competence of the Court to hear the case, and the other is the *locus standi* of the Applicants, i.e., the capacity of the Applicants to seise the Court with jurisdiction to decide the dispute before it. Both these matters were dealt with by the Court in 1962 as issues of jurisdiction. The Court said in 1962 that with respect to the "dispute" before it the Applicants had the right to invoke the compromissory clause. Once the Court has said that, the Applicants would not, in my view, be required to show further, as a matter of evidence, that they have a substantive right or legal interest in the subject-matter of the claim. They would be required to do so only if they were alleging damage or prejudice to their individual interests. What the Applicants are asking the Court to do is to declare that on a proper interpretation of certain provisions of the Mandate the

Respondent by its laws, policies and measures has committed breaches of those provisions. I find myself unable to accept the view that with respect to the same dispute the Applicants will have the capacity to bring the dispute before the Court but cannot recover unless they can show that their substantive rights or legal interests were directly involved or prejudiced, even though they have not alleged any damage and have not asked for reparation.

The Judgment of the Court says that in the present cases the dispute between the Parties relates exclusively to the "conduct" provisions of the Mandate, and does not relate in any way at all to the "special interests" provisions. While it is true to say that the practice of apartheid was the chief complaint of the Applicants, it must be noted that Submission No. 9 has implications far beyond the "conduct" clauses. The Applicants in Submission No. 9 say that the Respondent has attempted to modify the terms of the Mandate and that it has no power to do so without the consent of the United Nations. If that submission should fail, and should the Court also find that the Respondent has no enforceable obligations under the Mandate, outside Article 5, it would follow that the Respondent could modify even the "special interests" clause of the Mandate. In the same way the failure or success of Submissions 1, 2 and 6 could have consequences which would materially affect the "special interests" of members of the League. The distinction which the Court tries to draw between the "conduct" and the "special interests" provisions would appear, therefore, as a matter of treaty interpretation, to be illusory in relation to those submissions.

Article 7 (2) is a provision of the Mandate. It gives a member of the League the right to take the Mandatory to court and places on the Mandatory the corresponding obligation to accept adjudication. The Court in its Judgment seeks to restrict this right to be exercised only in respect of the provisions of Article 5 of the Mandate. The Court, even on its own line of reasoning, accepts that Article 7 (2) did confer the right of recourse to court. That right was conferred in respect of any dispute relating to the interpretation and application of the Mandate. The Court says that the mandates system being an activity of the League of Nations, rights cannot be derived from the mere fact of membership of the organization itself. This rigid distinction between the League and its members ignores the fact that the League existed because its members were there to run it and that any rights which States other than the Mandatory derived from the Mandate sprang from the fact that they were members of the League. The right to veto given to members of the Council of the League was precisely to emphasize the individual interests of members in the working of the system. There is no such water-tight division between the legal interest of the League and that of its members in the working of the system. There is in the mandates system a division of functions but not of interests. The League had identical interests with its members in the proper working not only of the Mandate but of the League system as well.

The Court dealing with the 1962 Judgment said that when it decided that the Mandate had the character of a treaty or convention and was still in force, this must be understood as a decision concerning the basis of survival. This, with respect, is an inadequate assessment of the Judgment. The 1962 Judgment decided more than that. It decided further, that the articles of the Mandate, in particular Article 7 (2), as part of that treaty, also survived, was still in force and was applicable to the present dispute. It was on the basis that Article 7 (2) was in force and was applicable that the Court held that it had jurisdiction to hear the present case.

The Respondent in presenting its argument in 1962 did so on the assumption that the Mandate did in some form survive. It had to take that line because if the Mandate did survive as a treaty or convention in force it must also have survived in some form in an objective or institutional sense since the territory and the Mandatory are still identifiable. The existence of the Mandate as a treaty or convention assumes its existence as an institution. The issue might arise as to whether all the obligations in the Mandate were enforceable but that is a different matter. The fact is that the Mandate could not survive as a treaty or convention without at the same time surviving in some form as an institution. The Court in the Advisory Opinion of 1950 said "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 . . .".

The Respondent in its argument against the survival of the Mandate, in the merits stage, proceeded on the basis that Article 6 was so essential to the Mandate that if, because of the dissolution of the League, it ceased to have any effect, then its disappearance would involve the demise of the Mandate as a whole;—it would carry to its grave all the other obligations which legally would have survived with the Mandate. The distinction between the survival of the Mandate as an institution and its survival as a treaty or convention is drawn only in the sense of showing that the Mandate could survive as an institution—as an embodiment of real rights—even though the treaty creating it could have come to an end. But the converse has not been shown to be the case, namely that it could survive as a treaty without at the same time surviving objectively. If the Mandate survived as a treaty or as an institution, what survived are the rights and obligations created by the treaty. So that the finding of the Court that the Mandate survived as a treaty or convention in force carries with it the implication that the Mandate must have survived also in an objective or institutional sense. It means that the rights and obligations created by the Mandate remained enforceable at law.

I have already stated that, in my view, the Applicants have not modified the claims in their final submissions and consequently that the nature of the dispute had not altered. The dispute relates to the interpretation and application of the terms of the Mandate and was therefore well within the textual ambit of Article 7 (2) of the Mandate.

The words of Article 7 (2) do not admit of any restricted interpretation. The Article reads:

> "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."

These words were considered by the Permanent Court in the *Mavrommatis* case *(Series A, No. 2)* and by this Court in its Judgment on the preliminary objections in the present cases. Both Courts took the view that the words were wide and include all disputes relating to the interpretation and application of the terms of the Mandate. There is nothing in Article 7 (2) which limits its application to disputes relating to the material interests of the Applicants. The Mandate for South West Africa contains several articles defining the obligations which the Mandatory owes to the League and its members and those it owes to the inhabitants of the territory. Of these, only Article 5 contains provisions which may be said to give members of the League individual rights. Article 5 reads:

> "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."

The Judgment says that the right to invoke the compromissory clause of Article 7 (2) was given to members of the League specifically to protect such individual rights as they might possess under Article 5 of the Mandate. It is said that it is only in respect of these provisions of that Article that a member of the League could say that its legal interests were or could be affected. In support of this interpretation, reference is made to the context in the *travaux préparatoires* in which clause 7 (2) came to be introduced. The contention is that Article 7 (2) was introduced into the Mandate at the same time as the provision for "special interests" was discussed and agreed to, and that there was nothing to suggest that

Article 7 (2) was meant to apply to the "conduct" clauses. A point of significance however is that nowhere was it stated that Article 7 (2) should be so limited in its application. The reference to the *travaux préparatoires* is, however, in my view, not justified in the present instance. It can be justified only as an aid to the plain words of the text or if there is any ambiguity in the words of Article 7 (2). In the absence of any such ambiguity it would be wrong for the Court to read into the words of the text an idea or an intention which would be contrary to the plain terms of the Article. In the *S.S. Wimbledon, Series A, No. 1* (1923), page 24, the Permanent Court of International Justice recognizing the fact that Germany had to submit to an important limitation of the exercise of the sovereign rights which she possessed over the Kiel Canal, said:

> "this fact constitutes a sufficient reason for the restrictive interpretation, *in case of doubt* of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what had been clearly granted." (Italics added.)

In the S.S. *Lotus, Series A, No. 10* (1927), the French Government sought to interpret the phrase "principles of international law" which appears in Article 15 of the Convention of Lausanne of 24 July 1923, in the light of an amendment which Turkey had tried to introduce in the Drafting Committee. The French and Italian representatives had reservations on the amendment but the British definitely rejected it. The Drafting Committee confined itself to a declaration to the effect that all questions of jurisdiction should "be decided in accordance with the principles of international law". The French Government sought to use the proposed amendment as indicating the intentions which guided the Drafting Committee when it used the phrase "all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law", and maintained that the meaning of the expression "principles of international law", should be sought in the light of the evolution of the Convention. The Permanent Court of International Justice in dealing with the French contention recalled what it had said in some preceding judgments and opinions, namely "that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."

In the *Memel* case, *Series A/B, No. 47*, page 249, the Permanent Court of International Justice also said:

> "As regards the arguments based on the history of the text, the Court must first of all point out that, as it has constantly held, the

preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear."

In the Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* (*I.C.J. Reports 1950*, p. 8) this Court said:

"The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and to apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter."

On the ground that the text of Article 7 (2) is clear, it is not in my view necessary to have recourse to the *travaux préparatoires* in interpreting it. It may be said that in spite of the views expressed above, the courts have in most cases had recourse to *travaux préparatoires* in interpreting provisions of treaties, but where they have done so the purpose has been to support rather than contradict the plain words of the text.

The Mandate was an attempt by the members of the League of Nations to introduce a new concept in international law. The Mandate, as this Court has said in its Advisory Opinion on the *International Status of South West Africa (I.C.J. Reports 1950)* and in the 1962 Judgment, created a new régime in international law. All the members of the League had an interest in the proper working of this new experiment. The political or humanitarian interest of members of the League proclaimed in paragraph 1 of Article 22 of the Covenant was, as the Court has stressed in its Judgment, given legal character by the other provisions of that Article and, with respect to South West Africa, the mandate instrument under consideration. By agreeing or subscribing to these provisions each member of the League manifested an interest in the proper working of the scheme and in the fulfilment of its ultimate purpose, and that notwithstanding that its individual interest may not be involved. Each member has therefore an interest in seeing that the provisions of the Mandate are properly observed and carried out by the Mandatory.

This Court in its Advisory Opinion in 1950 said, at page 133:

"The essentially international character of the functions which had been entrusted to the Union of South Africa . . . appears from the fact that any Member of the League 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."

In the same Advisory Opinion, Sir Arnold McNair in his separate opinion said:

"Although there is no longer any League to supervise the exercise

> of the Mandate, it would be an error to think that there is no control over the Mandatory. Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate."

The Applicants in their Applications and in their Memorials state that they have a legal interest in the proper administration of the Mandate. The Judgment of the Court does not deny that they have an interest but says that it is political or humanitarian and not legal.

The right of a State to bring an action for the protection of a common interest has been recognized in international law. Rosenne, at page 520 of *The Law and Practice of the International Court* states:

> "Another form of legal interest which it is believed is recognized automatically is that which is based upon participation by the applicant State in a treaty to which the respondent State is also a party, at all events so long as the treaty is still in force . . . where such a treaty contains a compromissory clause, the jurisdiction may be invoked in accordance with that clause even if material interests of a concrete character cannot be shown by the applicant State . . . This principle, which appears to be incontestable, is leading to two developments. The first is recognition of a treaty situation in which the contesting States do not have any interests of their own but a common interest, the accomplishment of the purpose of the convention. Any party to such a treaty has a legal interest sufficient to entitle it to invoke the compromissory clause against any other party."

The right to invoke the compromissory clause against a party implies or includes the right to recover on the claim if the evidence justifies it. The Applicant in such a case does not have to establish damage or prejudice to its material interests in order to succeed, unless it was claiming damages. All it needs to prove is that it belongs to the class of States to whom the right to bring the action is given in the compromissory clause.

The principle of common interest in the execution of a multilateral treaty was recognized by the Permanent Court of International Justice in the *S.S. Wimbledon, Series A, Judgment No. 1*, where it was stated that the Court could take cognizance of the suit in spite of the fact that the Applicants could not all adduce a prejudice to some pecuniary interest; for they had a "clear interest in the execution of the provisions [of the Treaty of Versailles] relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags".

The similarity of the position in the *S.S. Wimbledon* vis-à-vis those States parties to the treaty that cannot adduce a prejudice to some pecuniary interest and the instant cases is clear, and it is not destroyed by saying that those States owned ships and could conceivably find

themselves in the position that France was in in that case. In this connection it may be mentioned, although that point has not been taken up in the arguments that the apartheid residential laws of the Respondent in the mandated territory of South West Africa would adversely affect the freedom of movement of any nationals of the Applicant States who, not being "Whites" within the census classification of South West Africa, may choose to go there in the exercise of the rights given to nationals of members of the League under Article 5 of the Mandate in the same way as they affect the "Natives" of the territory. "Natives" by the census classification, as has been noted above, are persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa.

Under the segregation laws Natives can only live in areas set apart for them. Natives living on land reserved for "European" owned commercial firms at the time of its allocation may be required under the land settlement laws either to move or to work for the "European" firm. A Native missionary from any of the Applicant States will not enjoy the same or equal right of residence within the territory as a White missionary. He will be subject to all the apartheid discriminatory laws. The Minister of Native Affairs has certain powers over "Natives" (including "Native" missionaries) which he does not have over "White" missionaries. It is appreciated that no issue has been raised about missionaries, if any, from Applicant States, but the question whether or not the Mandate survives or can unilaterally be modified, which are some of the issues for decision on the Applicants' claims, can have consequences which are likely to affect the rights of nationals of the Applicant States going to the territory to exercise any of the rights allowed them under Article 5 of the Mandate. But that notwithstanding, the Applicants as members of the League have severally an interest in the proper carrying out of the terms of the Mandate by the Respondent.

In the Advisory Opinion on *Reservations to the Genocide Convention* (*I.C.J. Reports 1951*, p. 23), this Court, dealing with the special characteristics of the Genocide Convention, said:

> "The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties.

> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, 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 same principle was also stated by C. Wilfred Jenks in his book *The Prospects of International Adjudication* at page 524, in the following passage:

> "Speaking more generally, every party to a treaty has at least a potential legal interest in any breach of its provisions, and any breach of a rule of international law . . . prejudices at least potentially, the rights of all other subjects of international law or . . . of all subjects of the law who may be affected by it. Remoteness of interest may limit any reparation due but is unlikely to destroy the legal interest which is the source of liability for, as the *Mavrommatis Palestine Concessions* (Merits) case shows, the existence of a legal interest does not, in international law, depend on the actual suffrance of damage."

Enough has been said to show that there is support in international law that a State can have a legal interest in the prosecution of a common interest the subject-matter of a multilateral treaty like the Covenant of the League of Nations to which that State is a party.

The idea of the Mandate was in 1920 a new one and it would be a denial of its very purpose to say that when Article 7 (2) was drafted and accepted by members of the League, those founder-fathers were thinking only of the commercial or missionary interests of their nationals and not the main purpose of the Mandate also.

It has been said that nowhere in the Mandate was it stated that members of the League should have the right of protecting the Mandate. The answer is that it does not need to be so stated. The existence of such a right is inherent in the very act of creating the Mandate on behalf of the League and Article 7 (2) emphasizes the existence of such a right in the members of the League. It seems to me that this is a logical reason

for drafting Article 7 (2) in such wide terms. Article 7 (2) of the Mandate as a provision of the Mandate should be interpreted in a manner to ensure the purpose of the Mandate. To do otherwise would be to corrupt both the letter and the spirit of the Article.

The members of the League have, by virtue of their membership, a common interest in the proper exercise of the Mandate. That interest is a legal one and in the light of Article 7 (2) gives each member the right to take a delinquent Mandatory to court.

The Applicants are asking the Court to declare that certain actions of the Respondent as listed in the Memorials and in the oral hearings amount to a breach of the obligations of the Respondent as Mandatory under the Mandate. Assuming that the League was still in existence and a situation was reached as is the case now, where the Respondent was bent on pursuing policies which the overwhelming majority of members of the League felt were out of line with its mandate obligations, at the same time maintaining that its policies were not in breach of the mandate provisions and would not agree to change them or agree to any compromise solution, how was the difference to be resolved? The Judgment says that the Mandate provides no remedy for such a situation and that is was a risk the League members took with their eyes wide open. It seems to me that it was to meet such a situation that Article 7 (2) was introduced. The League itself cannot invoke the compromissory clause and I see nothing incompatible with Article 7 (2) in any member of the League who wished to carry the burden, making the difference or dispute its own and invoking the compromissory clause in order to ensure due compliance with the terms of the Mandate. To invoke the clause in such circumstances does not and cannot destroy the character of the League nor that of the Mandate. On the contrary, it would be in keeping with its duty as a member of the League to do so for the safeguarding of the sacred trust to which it had subscribed.

(Signed) Louis MBANEFO.