DISSENTING OPINION OF JUDGE KORETSKY

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 of 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 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 new, as became evident at this stage of the cases. And it is worthy of note that in the dissenting opinion of President Winiarski (pp. 455 ff.), in the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice (pp. 548 ff.) and in the dissenting opinion of Judge *ad hoc* van Wyk (pp. 660 ff.), the question of the Applicants' interests was considered on a jurisdictional plane.

The Respondent did not raise this question in its final submissions 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 decision 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*, 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 immuta-

bility, 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 vis* 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—a 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.

To define the binding force of the reasons for a judgment a reference has sometimes been made to the Advisory Opinion of the Permanent Court relating to *Polish Postal Service in Danzig* (*1925, P.C.I.J., Series B, No. 11*, p. 30). But the Permanent Court said on that occasion "by no means . . . every reason given in a decision constitutes a decision". It is evident that the Court did not assert then that reasons—as a part of a decision—have no binding force at all. It considered that not all reasons for a decision constitute a binding part of it. Somewhat earlier it contrasted "binding" reasons and "non-binding" ones; it said: "it is certain that the reasons contained in a decision, at least in so far as they go beyond the operative part, have no binding force as between the parties concerned."

The reason of the 1962 Judgment relating to "a legal right or interest" of the Applicants served as a ground for the Court's decision to dismiss the third preliminary objection submitted by the Respondent. And what was then decided with the reasons "on which it is based" is finally not provisionally decided. And I repeat that these reasons cannot be reversed in the way chosen by the Court.

The 1962 Judgment met with a somewhat widespread response in legal periodicals. I consider it worthwhile to cite at least from one article as it came from juridical circles in South Africa. I have in mind an article which was published in *The South Africa Law Journal*, 1964. The author (R. Ballinger) said there, almost paraphrasing the words of the Judgment:

> "The broad, clear and precise language (of Article 7) made it obvious that Members of the League had been understood to have a legal interest in the observance of its obligations towards the inhabitants of South West Africa by the Mandatory." (P. 46.)

And some pages later he wrote, evaluating the Judgment in a general way:

> "We must accept that one thing has been finally settled in international law by the Judgment on the Preliminary Objections: the Mandate as a whole is still legally in force and the Republic cannot unilaterally rule in the territory."

* * *

But since the Court based its judgment on the assumption of an absence of any legal right or interest on the part of the Applicants in their claims and since they, in the Court's words "cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims . . ." one has to return to the question of the nature of the Applicants' interest in their claims.

One might accept an old principle "*pas d'intérêt, pas d'action*". But the question is how to define a notion of "interest" and how to say what an interest is about. Should we have recourse to the notion which was developed in civil law doctrine and practice, of which the inherent characteristic was and still is to regard all interests in the light of material, property interest, a man's personal (subjective), proper, own interest (which, though sometimes a moral interest, is more often expressed "in cash" as well)?

Long ago there were warnings against the danger of an unreserved transference of the principles of civil law and process into international (public) law and into the procedure of international courts. Here the character of relations and rights is of another kind. Here one cannot think in civil law categories. The notion of a "general interest" finds wider scope in international law. It may be seen that the notion of a "general interest" and actions in a general interest are now not alien to national law systems (particularly in socialist law systems, even in their civil-law procedures).

The French authors H. Solus and R. Perrot (in their *Droit judiciaire privé*, 1961), speaking (p. 98) about the Roman principle "no right,

no action"—"this early concept of the action lived on after the Roman procedure, and endured through the passing centuries"—have noted further:

[Translation]

"Throughout the whole of the nineteenth century, this concept was admitted without difficulty by private law theorists until the time when the intense development of contentious business in the administrative courts, at the beginning of the twentieth century, made it necessary for the theorists to reconsider the traditional concept, which was a legacy from Roman law and which the classical doctrine had conserved. It was indeed no longer adapted to proceedings *ultra vires* the essential object of which is not to settle a dispute between two individuals who claim concurrent rights, *but to ensure respect for legality*", ... and, for that purpose, "it was necessary to assimilate proceedings *ultra vires* to a real action at law; the theorists of public law strove to fit the structure of those proceedings into the notion of action but concerned themselves only with the seisin of the court and *carefully avoided all reference to any subjective right*" (italics added).

Might one say, paraphrasing the Solus-Perrot words, that the essential object of the Applicants was to ensure respect for a proper interpretation and application of the provisions of the Mandate and that they had and have a right to apply to the Court without making any reference to "any subjective right"?

It is necessary to turn to the history of the inclusion of the jurisdictional clause in the mandate instrument. It is a fact that the Mandates Commission (usually called the Milner Commission) was set up in June 1919 for the purpose of drafting mandates instruments 'B' and 'C'. There were two tendencies that arose at once *(a)* to defend first of all the interests of commercial and industrial circles (this was reflected in seeking to include in the drafts clauses concerning the "open-door", and "commercial equality"), and *(b)* to protect indigenous peoples. The French member of the Commission (M. Simon) expressed the view "that the idea of commercial equality preceded that of the Mandates, that it embraced the whole theory of the Mandates, that the Mandates had been devised to ensure: (1) commercial equality; (2) the protection of indigenous populations" and that "the Mandate could not exist without those two conditions". *[Translation.]* But the President of the Commission (Lord Milner) did not agree with this.

He said:

[Translation]

"He maintained that the 'C' Mandate differed from the 'B' Mandate precisely in respect of commercial equality. Territories which came within the category of the 'C' Mandate were attached to the State of the mandatory Power and were consequently *subject*

only to the stipulations concerning the protection of indigenous peoples . . ." (italics added).

And this difference between the two kinds of mandates 'B' and 'C' resulted in two kinds of jurisdictional clauses in drafts relating to them.

The draft of mandate 'B' had Article 15 which consisted of two paragraphs: one which corresponds to the present Article 7 (2) of the Mandate and a second which read as follows:

[Translation]

"The subjects or citizens of States Members of the League of Nations may likewise bring claims concerning infractions of the rights conferred on them by Articles 5, 6, 7, 7*a* and 7*b* of this Mandate before the said Court for decision."

The draft of mandate 'C' contained a jurisdictional clause (Article VI) consisting of one paragraph only, which repeated the wording of the corresponding (first) paragraph of Article 15 of the draft of mandate 'B'.

As this might have some importance for the interpretation of Article 7 (2) of the present Mandate it is worthy of note that Article 15 (2) dealt not with national rights of member States but with the rights of nationals of such States. An attempt was then made on the basis of this paragraph to allow private persons and companies to be parties in cases before the Court. But that idea met with strong objection, and then, on Lord Cecil's proposal, the paragraph was drafted as follows:

[Translation]

"The Members of the League of Nations will likewise be entitled on behalf of their subjects or citizens to refer claims for breaches of their rights, etc."

This was a typical formula for a clause providing for diplomatic (judicial) intervention.

The Cecil formula did not omit any references (see "etc.") to Article 5 (about the commercial and industrial rights of citizens), Article 6 (about the freedom of conscience and religion), Article 7 (about equal treatment), Article 7*a* (about concessions), Article 7*b* (about tariffs), and it is clear that possible claims based on those Articles, which were transformed by the new text from being rights of nationals of member States to being national (special) rights of these States, did not and do not limit the rights of member States which were envisaged in other Articles of the drafts, such as Articles 3, 4 and 10 (obligations in relation to indigenous peoples), Article 8 (about the prohibition of the traffic in opium), etc.

The wording of paragraph 2 was omitted in the subsequent texts of the Mandates (except that of Tanganyika) but one cannot interpret the omission as a ground for asserting that Article 7 (2) confers on a member State the right to submit to the Court a dispute with the Mandatory relating to the interpretation and application of the Mandate only if

it can establish its own legal right or interest in its claim. The Court in its 1962 Judgment stated rightly in this connection: "Protection of the material interests of the Members or their nationals is of course included within its [Article 7] compass, but the well-being and development of the inhabitants of the Mandated territory are not less important." (P. 344.)

All this relates to a 'B' mandate. A 'C' mandate had (and has) no provisions which could be connected (directly at least) with the specific legal rights and interests of member States or their nationals (save perhaps in some measure Article 5, which was added for reasons which were not aimed at protecting direct State interests). And accordingly the draft of a 'C' mandate had no paragraph 2 analogous to that of a 'B' mandate.

But why at that time was a system of judicial supervision in regard to the correctness of the interpretation and the application of the provisions of the Mandate introduced into the mandates system?

Some general considerations are necessary by way of explanation. The mandates system arose in the conflicting conditions of the post-War I international situation, when the Principal Allied and Associated Powers, or some of them, realized that they should try—parallel with their endeavour to reconcile their contradictions—to mitigate the colonial forms of undisguised domination, to respond, in the epoch of national liberation movements in colonial territories, to the struggle of dependent peoples striving for independence, to pacify them, to give a hope to those peoples that they would be able to achieve their freedom by peaceful means, through the mandates system. It was then that the notion of a sacred trust of civilization found expression.

This made it possible for the Court to say in its 1950 Advisory Opinion (p. 132): "The Mandate was created in the interest of the inhabitants of the territory and of humanity in general, as an international institution with an international object—a sacred trust of civilization." Reference was made in the Court to President Wilson's words: "The fundamental idea would be that the *world* was acting as trustee through a mandatory."

To defend such a system (as created in the interest of indigenous peoples), seemed to some to be a "common cause".

Two kinds of securities for the performance of this trust were created: *(a)* political supervision by the Council of the League of Nations, to whose satisfaction the Mandatory was required to make an annual report, and *(b)* judicial supervision by the Permanent Court, which had to decide whether the Mandatory's interpretation or application of the provisions of the Mandate were correct.

It is not necessary to dwell at any length on the concrete reasons why

the task of supervision was divided between the Council of the League and the Permanent Court. It was said that it was rather difficult to settle disputes relating to the Mandate in the Council as under the unanimity rule the vote of a Mandatory was a deciding one, that it would sometimes be more convenient to turn a dispute relating to the interpretation or the application of the provisions of the Mandate into the channel of calm judicial consideration.

But who was entitled to institute proceedings against a Mandatory? Neither the League itself nor its Council could bring an action in the Court. And then the right to apply to the Court in defending the "common cause" was entrusted to any Member of the League.

Was this something strange at that time? I venture to cite an excerpt from a pamphlet of the League: *La Cour permanente de Justice internationale* (Geneva, 1921, p. 19):

> *[Translation]*
>
> "The question has been raised whether the principal organs of the League—above all, the Council—should not be able, as such, to be a party to a dispute before the Court. This idea has, however, been discarded both by the Council at its Brussels meeting and by the Assembly. On the other hand, it is understood, as is expressly stated in the report on the Statute approved by the Assembly, that groups of States may appear as a party. Consequently, there is nothing to prevent the individual States represented at a given moment on the Council from instituting an action collectively, but not as the Council of the League. This possibility may prove to be of special value when it comes to enforcing certain stipulations of the treaties concerning the protection of racial, religious, etc. minorities."

And one could find in the minorities treaties, which were concluded afterwards, a jurisdictional clause, for example in the declaration, concerning the Protection of Minorities in Albania, 2 October 1921, Article 7.

> "Any difference of opinion as to questions of law or fact arising out of these Articles [of the Treaty] between the Albanian Government and any Power a Member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations. Any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice . . ."

It is important to emphasize that any Member of the Council of the League had a right to apply to the Permanent Court in regard to questions connected with any of the provisions of the Treaty without requiring any specific personal interest of a given Member or its nationals in a dispute with the government concerned. The Article mentioned

only "any *difference of opinion* as to questions of law or fact ...". The fact that in the minorities treaties the circle of possible Applicants was limited does not prevent their jurisdictional clauses from being considered as a *manifestation* of a new (in international judicial procedure) principle of the recognition of actions in a general interest.

This principle had to be developed in the mandates system. And that was done. It is relevant to cite Judge Oda, who said in his dissenting opinion in the *Mavrommatis* case (*P.C.I.J., Series A, No. 2*, p. 86):

> "Since the Mandate establishes a special legal relationship it is natural that the League of Nations, which issues the Mandate, should have rights of supervision as regards the Mandatory. Under the Mandate, in addition to the direct supervision of the Council of the League of Nations (Articles 24 and 25) provision is made for *indirect supervision by the Court*; but the latter may only be exercised at the request of a Member of the League of Nations (Article 26). It is therefore to be supposed than an application by such a Member must be made exclusively with a view to the protection of *general interests* ..." (Italics added.)

These "general interests" in relation to a 'C' mandate might be only the interest of protecting the indigenous peoples, which were (and are) under the Mandate. And if the judgment of the Court insists that the Applicants had to establish their own legal interests in the subject-matter of their claims, one might say that the general interest in a proper observance of the provisions of the Mandate became the interest of any Member of the League on his own, as his proper interest.

This is confirmed by what might appear to be merely a detail: Article 7 (2) of the Mandate puts the word the "provisions of the Mandate" in the plural—that is to say, the Applicants possessed the right to apply to the Court on questions relating to the interpretation or the application of all provisions of the Mandate (and not merely relating to provision 5 (the missionaries clause)).

But this does not mean that the Applicants could be considered as some kind of individual control organ. The Court itself was and is a judicial supervisory organ in respect of the questions envisaged in Article 7 (2) of the Mandate, but the right to institute proceedings against a Mandatory by bringing an application against him was in the hands of any Member of the League. When Judge Nyholm (*P.C.I.J., Series A, No. 11*, p. 26) spoke of "a right of control which a State Member of the League may exercise", he added "*by applying to the Court*" (italics added), so a State Member did not "by applying to the Court" convert itself into an organ of judicial control. It was endowed with a right, one may say, of judicial initiative within the limits defined by Article 7 (2).

To exercise this judicial initiative was the real interest of tne Applicants in these cases. They have, from the very beginning, asserted (Memorials, pp. 91-92) 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".

And, to prove the Applicants' right to apply to the Court on this ground, it is not necessary to assert that the Mandate was established "*on behalf* of the Members of the League in their individual capacities" (Judgment, para. 20), or that the Applicants (as former Members of the League) were separate parties to the instrument of mandate as such, that they had a status, analogous to that of a beneficiary or—which is much the same—that they were *tertii in favorem* of whom the Mandate was instituted. To lay down these conditions would be beside the point as the Applicants themselves did not rest their right to invoke the jurisdiction of the Court upon such grounds.

Article 7 (2) does not call for such conditions. Its wording is quite clear to anyone who is not seeking to read into it what it does not contain. It provides for the submission to the Permanent Court of "any dispute whatever ... between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate". This is the basic *legal criterion* (to use the words of the Judgment in the *Mavrommatis* case (*P.C.I.J., Series A, No. 2*, p. 16)) which (as was said there) determined and limited the jurisdiction of the Court in cases related to Mandates. If one wants to differentiate in these cases between a right to invoke the jurisdiction of the Court and the substantive right (which underlies the claims) it is practically impossible to do so as in these cases the substantive right of the Applicants, their legal right or interest, in the subject-matter of the claims, one may say, coincides with their right to submit to the Court their dispute relating to the interpretation or the application of the provision. In the Applications they did not seek anything for themselves. They asked the Court to declare and adjudge (if we generalize their final submissions) mainly on the question of the rightful interpretation and application of the provisions of the Mandate, as the Respondent denied that its official policy of apartheid is inconsistent with Article 22 of the Covenant and more especially with Article 2 of the Mandate. Here the question is not that of claiming from the Mandatory the carrying out of the "conduct of the Mandate" provisions of the Mandate. This would be in some sense a "displacement" of the real position of the Applicants.

They do not dictate to the Mandatory how to carry out the Mandate; they have laid before the Court the question of how to interpret the provisions of the Mandate; whether they are rightly applied by the Mandatory; whether the Mandatory's policy in the Territory of South West Africa, which has caused so much concern to world public opinion and to Members of the United Nations, is consistent with the provisions of the Mandate and with its purpose and principles. Such a right of

the Applicants to apply to the Court on these matters was established not *aliter vel aliunde* (see para. 65), but in Article 7 (2). This right is a right of judicial initiative, which one might compare *mutatis mutandis* with legislative initiative.

(Signed) V. KORETSKY.