# DISSENTING OPINION OF VICE-PRESIDENT WELLINGTON KOO

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. Pursuant to Article 57 of the Statute I propose to state the grounds for my dissent.

## I

In the first phase of the instant cases, it will be recalled, the Government of South Africa, in response to the Applications and Memorials of Ethiopia and Liberia, filed four preliminary objections, submitting "that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings and that the honourable Court has no jurisdiction to hear, or adjudicate upon, the questions of law and fact raised in the Applications and Memorials . . .". The third objection as finally presented in the oral proceedings of 1962 states that:

> "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".

The Court by its Judgment of 21 July 1962 rejected all the four objections and stated separate reasons for each rejection. With reference to the third objection, the Court stated, *inter alia*:

> "For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members." (*I.C.J. Reports 1962*, p. 343.)

In its operative clause the Judgment states that "The Court, by eight votes to seven, finds that it has jurisdiction to adjudicate upon the merits of the dispute".

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.

But the mandates system, while it bears some resemblance to, and was probably inspired by, the concept of guardianship or tutelle in private law, the similarity is very limited. Unlike the municipal law concept with its simple characteristics and limited scope, the mandates system has a complex character all of its own, with a set of general and particular obligations for the mandatory to observe or carry out, and with a scheme of multiple control and supervision by the League of Nations with its Council, Assembly, member States and the Permanent Mandates Commission and with judicial protection in the last resort by the Permanent Court. It is a novel international institution. Nothing of the kind had existed before. It is *sui generis*.

At this juncture I think a few words about the historical background of the creation of the mandates system will be useful to enable a full understanding and appreciation of its nature, spirit and purport. As we all know, it was President Wilson, author of the Fourteen Points, who first made the radical proposal in the Council of Ten of the Versailles Peace Conference to renounce in fact the time-honoured principle of annexation by conquest and to set up in its stead a new international mandates system to be operated by the League of Nations and based upon the concept of a sacred trust entirely in the interest of the inhabitants of the territories to be thus placed under mandate. He had at first even proposed direct administration by the League of Nations of the territories taken from the Central Powers. He advocated the mandates system so strongly as to make it practically a *sine qua non* in the peace settlement. It was, however, opposed at first with equal firmness by some of his principal allies in the war, notably some of the British Dominions. The confrontation of the two opposing theses became so serious as to constitute not only a deadlock but even to threaten for a time the break-up of the Peace Conference. It was largely through the conciliatory efforts of Lloyd George that an agreement was finally reached on this difficult question.

The resulting compromise was that the "securities for the performance of this trust should be embodied in this Covenant" of the League of Nations. While paragraphs 7 and 9 of Article 22 of this instrument provide respectively for the rendering to the Council of the League an annual report by the mandatory "in reference to the territory com-

mitted to its charge" and for the constitution of a permanent commission "to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the Mandates", not all securities were spelled out in the same instrument. On the contrary by paragraph 8 "the degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be expressly defined in each case by the Council". Thus, for example, Article 6 of the Mandate for South West Africa provides for the making of annual reports by the Mandatory "to the satisfaction of the Council", and Article 7 of the same Mandate provides in the first paragraph that "the consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate" and in the second paragraph (the adjudication clause) that—

> "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 whole system was inspired by, and built upon, the cardinal purpose of protecting and promoting the welfare of the peoples of the territories placed under mandate. It constituted an international joint enterprise, the success of which was predicated upon the co-operation of all the parts and parties to it under the League—the Council, the Permanent Mandates Commission, the Assembly, the member States and the mandatories. In order to ensure success various securities were provided both in Article 22 of the Covenant and in the respective mandate instruments. The examination and consideration of the mandatories' annual reports on the administration of their respective territories under mandate by the Council with the assistance and advice of the Permanent Commission and the discussion and debate in the annual session of the Assembly on the chapter on mandate administrations in the Council's own yearly report, in both cases with the participation of the representatives of the Mandatory Powers, constituted the normal operation of the supervisory functions of the League of Nations. The harmonious and effective working of the securities for the protection of the overriding interests of the inhabitants of the mandated territories manifestly depended upon the whole-hearted co-operation of the mandatory States. But, in view of paragraph 5 of Article 4 of the Covenant requiring representation of a Member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League; paragraph 6 of the same provision conferring the right to cast one vote, and paragraph 1 of Article 5 of the same instrument requiring "the agreement of all the Members of the League represented at the meeting" for decisions at any meeting of the

Assembly or the Council, the authors of the mandates system could not have been unaware of human frailties and therefore the unrealistic nature of any hope and faith on their part that every mandatory could always be relied upon to show an identity of views with the Council on a given matter relating to the particular mandate, or to manifest a never failing spirit of accommodation to yield to the views of the Council in the interest of the peoples of the territories under mandate. To meet such a contingency, however rare it might be, and equally conscious of the primary purpose of the mandates system, the authors of the mandate instruments, appointed by the Principal Allied and Associated Powers in 1919, introduced the adjudication clause first in 'B' mandates and later in 'C' mandates, and used the same text for both categories, in order to provide a means of judicial protection of the interests of the said inhabitants through the exercise by individual Members of the League of their substantive right or legal interest in the observance of the mandate obligations toward them by the respective mandatories.

In other words 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 mandatories originated with and 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), 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 Africa 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 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.

Moreover, before the draft 'B' and 'C' mandates were sent to the Council of the League of Nations, they had also been referred to the legal experts of the Drafting Committee of the Peace Conference for the purpose of putting them into the proper legal form. Though these experts were not called upon to discuss the content of the drafts, it is reasonable to assume that if the purport of the compromissory clause had been understood by them to be something much more limited than the actual language employed in the drafts, they would certainly have suggested some revision. But they did not make any such suggestion and left the broad, comprehensive language of the clause as it had been presented to them.

Furthermore, the origin of the compromissory clause and the evolution of its present form of wording as to its content is also significant and throws light on the intention of its authors. As brought out in the separate opinion of Judge Jessup appended to the 1962 Judgment, the compromissory clause was first proposed in the United States' alternative draft for 'B' mandates submitted to the Milner Commission. The representatives of Great Britain and France "both said that they had no objection to the principle of recourse to the international Court" but they objected to the grant of a right to individuals to invoke the jurisdiction of the Court for decision relating to infractions of the rights conferred on them by certain provisions of the draft mandates. However, further discussion resulted in the deletion of the references to the specific articles concerning rights of individuals. All this related to the draft for 'B' mandates, which was, after revision, duly approved by the Commission. Shortly afterwards, a draft was adopted to serve as a pattern for 'C' mandates with a paragraph concerning reference to the Court which "was identical with the first paragraph of the United States' draft", which had embodied the principle of recourse to the international Court and to which the British and French representatives had said that they had no objection. (See Judge Jessup's separate opinion, *I.C.J.*

*Reports 1962*, p. 388.) The revision by the Council of the League of Nations of the phrase "any dispute whatever between the members of the League of Nations ..." into the phrase now found in Article 7, namely "if any dispute whatever between the Mandatory and another Member of the League of Nations" was explained by Viscount Ishii, the Rapporteur, on the ground that the members of the League other than the Mandatory "could not be forced against their will to submit their difficulties to the Permanent Court". This change was adopted by the Council and the whole Mandate for South West Africa was approved on 17 December 1920. It is thus seen that all those who had anything to do with the original drafting or the final revision of the clause took the implicit principle of judicial protection relating to the observance of the mandate obligations by the respective mandatory Powers as a matter of course and raised no objections whatever.

It should be stated, in addition, that the same adjudication clause with its broad, comprehensive language and a practically identical text, is embodied in all the 'B' and 'C' mandates, notwithstanding the marked difference between the great variety of national or material interests of the member States, as in the case of the Mandate for Palestine, and the one single kind of national or individual interests relating to missionaries and their freedom to practise their calling, as in the case of the Mandate for South West Africa (Article 5). This fact would seem to support the view that Article 7 (2) of the latter Mandate, like similar provisions in the other mandates of 'B' and 'C' categories, is intended to provide a means primarily for the exercise by League Members of their legal right or interest, through the judicial process, in the performance of the mandate by the mandatory as to its obligations toward the inhabitants of the mandated territory and toward the League of Nations, and only secondarily for the judicial protection of the national or material interests of the Members of the League of Nations.

There is indeed yet another fact which throws light on the point of issue under consideration. The order in which the various obligations of the Mandatory are stipulated in the mandate instrument for South West Africa is not without significance. Thus the unquestionably most important of these obligations—those relating to the promotion to the utmost of the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate—are provided for in Article 2. Then follows Article 3 providing for the prohibition of slave-trade and forced labour and the control of the arms traffic and the prohibition of the supply of intoxicating spirits and beverages to the Natives. Article 4 prohibits the military training of the Natives, etc., and finally Article 5 for ensuring in the Territory freedom of conscience and the free exercise of all forms of worship and the admission of all missionaries, nationals of any States Members of the League of Nations, to enter into, travel and reside in the territory

for the purpose of prosecuting their calling. After the stipulation of these substantive obligations of the Mandatory follows Article 6 relating to its adjectival obligations of submitting annual reports to the satisfaction of the Council of the League, etc. At the end of the mandate instrument comes Article 7, of which paragraph 1 stipulates the condition for any modification of the terms of the Mandate and paragraph 2 provides the compromissory clause worded in broad comprehensive terms as already noted above. It is therefore not unreasonable to infer from this arrangement the varying degrees of importance which the authors of the instrument attached in their minds to the different categories of obligations of the Mandatory and to conclude that the fact that the compromissory provision with its all-embracing language comes at the end, was intended to apply to all obligations undertaken by the Mandatory and not merely to those under Article 5, thus further confirming the comprehensive scope and purport of Article 7, paragraph 2, as to "*any dispute whatever* . . . relating to the interpretation or the application of the provisions of the Mandate".

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

It is also to be noted that the resolution of the Assembly of the League of Nations on mandates adopted on 18 April 1946 at its final session before dissolution, corroborates the above finding. As it will be recalled, the final paragraph of this resolution reads:

> "4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been

agreed between the United Nations and the respective mandatory Powers."

The "expressed intentions" evidently refer to the official declarations made by the representatives of the various mandatory Powers at the meetings of the Assembly, 9-13 April 1946. It is unnecessary to reproduce them here, since they were fully cited in the text of the 1962 Judgment. Suffice it to say that they were all of the nature of a pledge to continue to administer the respective mandated territories in accordance with their international obligations and with the spirit of the respective mandates.

This League session and the resolution it passed on the mandates has more than ordinary meaning and significance with reference to the question now under consideration. In the first place the Council of the League which normally would, as its proper function, deal with the question of the mandates held no meeting for the purpose and instead "with the concurrence of all the members of the Council which are represented at its present session joined the Assembly" in deciding "that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council". This would seem to confirm that the right to ensure the performance of the mandate obligations by the mandatory Powers had always been understood to be shared by the Assembly. Secondly, the pledges of the various mandatory Powers to continue to administer their respective mandates in accordance with the obligations stipulated thereunder as far as possible were in effect made not so much to the Assembly as a body as to the member States. For while the latter were meeting collectively as the Assembly, it was the last time they assumed this character. The dissolution of the League of Nations was by its own resolution to take effect the day following and with it the Assembly, as well as the Council and the Permanent Mandates Commission, equally disappeared for good. If the pledges were to serve any purpose at all as to ensure the observance of the Mandates by the mandatory Powers, they must have been, and were in fact, intended to be addressed more effectively to the individual member States, thereby confirming once more the possession by the latter of a substantive right or legal interest in the mandate performance in all cases.

Indeed, on the whole question of the existence of a legal interest of each Member of the League of Nations in the mandates the analysis and conclusion of Judge Read in connection with the Court's Advisory Opinion in 1950, to which some reference has just been made above, are significant and illuminating. He divided the mandate obligations into three classes.

> "The first, and the most important, 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. The most important, the corner-stone of the mandates system, was 'the principle that the well-being and development of such peoples forms a sacred trust of civilization' a principle which was established in paragraph 1 of Article 22 of the Covenant.

The second kind of obligation comprised those which were due to, and enure to, the benefit of the Members of the League: e.g., in respect of missionaries and nationals.

The third kind of obligation comprised the legal duties which were concerned with the supervision and enforcement of the first and second. There was the compulsory jurisdiction of the Permanent Court, established by Article 7 of the Mandate Agreement; and there was the system of reports, accountability, supervision and modification, under paragraphs 7, 8 and 9 of Article 22 and Articles 6 and 7 of the Mandate Agreement. . . .

These obligations have one point in common. Each Member of the League had a legal interest, vis-à-vis the Mandatory Power, in matters 'relating to the interpretation or the application of the provisions of the Mandate'; and had a legal right to assert its interest against the Union by invoking the compulsory jurisdiction of the Permanent Court (Article 7 of the Mandate Agreement). Further, each member, at the time of dissolution, had substantive legal rights against the Union in respect of the Mandate." (*I.C.J. Reports 1950*, pp. 164-165.)

A little further on he said that he regarded "as significant the survival of the rights and legal interests of the Members of the League"; with regard to this point, he observed:

". . . the same reasons which justify the conclusion that the Mandate and the obligations of the Union were not brought to an end by the dissolution of the League, lead inevitably to the conclusion that the legal rights and interests of the Members, under the Mandate, survived. If the obligations of the Union, one of the 'Mandatories on behalf of the League', continued, the legal rights and interests of the Members of the League must, by parity of reasoning, have been maintained." (*Ibid.*, p. 166.)

Thus from the foregoing account of the origin of the basic concept of the mandates system, the background of events and circumstances which contributed to its establishment, the history of the drafting and incorporation of the adjudication clause in all the 'B' and 'C' mandates and the meaning and purport of the 18 April 1946 resolution of the last session of the Assembly of the League of Nations as well as the broad, comprehensive language of the provisions of Article 7 (2) of the Mandate under consideration (and indeed of similar articles in the other mandates) all point to the existence of a common intention of

the authors of the mandate system and the parties to the mandate agreements to make it work and to ensure its effective working with the necessary guarantees in the form of administrative supervision and control by the Council of the League and judicial protection by the Permanent Court through the exercise by Members of the League of their legal right or interest in the performance of the mandates.

It has been maintained that the existence of such a common intention was most unlikely when account is taken of the state of development of the concept and institution of compulsory jurisdiction in the period of the early twenties and the general reluctance to assume such an extensive and onerous obligation. But it should be noted that the whole mandates system was at the time a new and novel idea. It was contemporary with the incorporation of the principle of international protection of labour in the Constitution of the International Labour Organisation and a series of conventions which followed, recognizing a legal interest of member States and conferring upon them "the right to file a complaint with the International Labour Office" against any other Member for "effective observance of any convention which both have ratified". (Articles 26, 411 and 423 of the said Constitution of the International Labour Organisation.) The minorities treaties concluded during the same period for the protection of minority populations in the newly created States and the newly transferred territories recognized the legal interest of a Member of the Council of the League of Nations in the observance of these treaties and obligated the State responsible for the protection to accept compulsory jurisdiction of the Permanent Court of International Justice in a dispute brought before it by the other party thereto. (Hudson, *International Legislation*, Vol. I, pp. 312-319.)

The basis concept of the mandates system was strongly opposed by the prospective mandatories at first but it was insisted upon with equal determination more particularly by its primary author, President Wilson. However, once the principle was agreed upon, all parties appeared to be in earnest to make the operation of the system an assured success with its multiple guarantees for the observance of the mandate obligations. It would be incompatible with the principle of good faith to suppose that the mandatory Powers (including the Respondent) having voluntarily accepted the system did not intend really to co-operate for its complete success by respecting the principle of judicial protection embodied in it. That the opposite was the situation is evidenced by the fact that neither the authors of the draft mandates nor the mandatory Powers in approving the respective mandate agreements raised any objection to the plain, all-embracing language of the adjudication clause. On the contrary, the fact of uniform absence of objection on their part to this language of the clause only makes it clear beyond doubt that they all accepted the implicit principle as a matter of course—as an inherently requisite feature of the mandates system itself.

On this point of ascertaining the common intention of the parties to a legal instrument, it is pertinent to cite here what Judge Lauterpacht wrote:

> "Undoubtedly the treaty is the law of the adjudicating agencies. But, at the same time, the treaty is law; it is part of international law. As such it knows of no gaps. The completeness of the law when administered by legal tribunals is a fundamental—the most fundamental—rule not only of customary but also of conventional international law. It is possible for the parties to adopt no regulation at all. They may expressly disclaim any intention of regulating the particular subject-matter. But, in the absence of such explicit precaution, once they have clothed in the form of a legal rule and once they have found themselves in a position in which that subject-matter is legitimately within the competence of a legal tribunal, the latter is bound and entitled to assume an effective common intention of the parties and to decide the issue. That common intention is no mere fiction."

After citing the Advisory Opinion of the Permanent Court of International Justice on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* and the Advisory Opinion of the same Court on the *Competence of the International Labour Organisation to Regulate Incidentally the Personal Work of the Employer*, he continued:

> "The Court admitted that the treaty in question did not contain a provision expressly conferring upon the Organisation jurisdiction in such a very special case as the present. But it gave an affirmative answer to the question put to it for the reason that such competence of the International Labour Organisation was essential to the accomplishment of the purpose of the Organisation as revealed in the constitution.
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> In these and similar cases the common intention in relation to the particular case must be derived from the common intention of the Treaty as a whole—from its policy, its object and its spirit . . ." ("Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", in *British Year Book of International Law*, 1949, Vol. XXVI, pp. 48-85, at p. 79.)

The principle stressed in the above passage is *a fortiori* applicable to the point of issue under consideration. There is no explicit provision wanting. On the contrary, Article 7 (2) of the Mandate for South West Africa stands out not only to sanction the right of action in the case of the Applicants as Members of the League of Nations but also to bear witness to the implicit existence of a common intention of the parties to the mandate agreement to recognize a legal right or interest

of such Members in the observance of the mandate agreement by the Respondent.

Moreover, while it may be true that acceptance of the concept of a sacred trust of civilization in and of itself does not necessarily imply more than a moral or humanitarian obligation to respect it, once this concept is made the "corner-stone" of the mandates system and implemented in the legal instruments based upon it such as Article 22 of the Covenant and Article 7 (2) of the Mandate Agreement for South West Africa, full account must be taken of this fact in interpreting the legal relations, the rights and obligations of the parties to these instruments. Such a course does not mean, nor could be said to imply, judicial legislation. It is only a legitimate application of the recognized canons of interpretation, in order to give full effect, as regards the Mandate, to "its policy, its object and its spirit".

In this connection it is also appropriate to recall what this Court said of the Genocide Convention:

> "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." (*I.C.J. Reports 1951*, p. 23.)

The Mandate for South West Africa, like all other mandates, is based upon the principles and provisions of the mandates system as conceived by its authors and as subscribed to by all Members of the League of Nations, including the Respondent, as parties to the Covenant, which is a multilateral treaty. By their common will the high ideals which inspired Article 22 of this treaty, provide "the foundation and measure of all its provisions".

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 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 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.

Nor is it easy to appreciate the cogency or relevance of the argument to the effect that if there were a necessity for judicial protection of the sacred trust under the mandates system the same necessity must exist under the trusteeship system, on the ground that the resolutions of the United Nations General Assembly, although they can be adopted without the concurrence of the administering authority are, when so

adopted, only recommendatory in character and have no binding force and yet the jurisdictional clause embodying the right of action of individual member States to invoke the Court is wholly absent from certain trusteeship agreements falling within the functions of the General Assembly.

Manifestly this argument underestimates the significance of the differences in the basic scheme of supervision and control relating to the implementation of the trusteeship agreements as compared with that which was embodied in the mandates system. It is not necessary to enumerate them here; it suffices to note briefly that under Article 18 of the United Nations Charter decisions of the General Assembly on important questions are made simply by a two-thirds majority in contrast with the requirement of a unanimous vote in the Council of the League of Nations, as also in the Assembly, including, in any matter relating to a Mandate, the affirmative or non-dissent vote of the mandatory Power, particularly, in the Council, either as a regular or *ad hoc* member. Although it is true that the resolutions of the General Assembly relating to trust territories as in many other matters are usually passed in the form of recommendations, the latter are far from being only of the character of a pious wish or moral persuasion. Pursuant to Article 88 of the Charter the Trusteeship Council formulates a questionnaire on the political, economic, social and educational advancement of the inhabitants of each trust territory and, in the language of this provision:

> "the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire".

In the individual trusteeship agreements it is either expressly stipulated, as, for example, by Article 16 of the Trusteeship Agreement for the Territory of Togoland under British Administration, of 13 December 1946, that:

> "The Administering Authority shall make to the General Assembly of the United Nations, an annual report on the basis of a questionnaire drawn up by the Trusteeship Council in accordance with Article 88 of the United Nations Charter. *Such reports shall include information concerning the measures taken to give effect to suggestions and recommendations of the General Assembly* and *the Trusteeship Council* . . ." (Italics added.)

Or it is implicitly provided, as in Article 8 of the Trusteeship Agreement for the Territory of New Guinea of 13 December 1946:

> "The Administering Authority undertakes, in the discharge of its obligations under Article 3 of this agreement [undertaking to administer the Territory in accordance with the provisions of the

Charter and in such a manner as to achieve, in the Territory, the basic objectives of the International Trusteeship System which are set forth in Article 76 of the Charter]:

1. To co-operate with the Trusteeship Council in the discharge of *all the Council's functions* under Articles 87 and 88 of the Charter; . . ."

In practice the General Assembly also keeps a close watch and calls upon each administering authority concerned through the Trusteeship Council to indicate in its annual report what measures it has adopted to implement the suggestions and recommendations of the General Assembly and the Trusteeship Council. For example, resolution 323 (IV) of the General Assembly of 15 November 1949 resolves:

"6. To ask the Trusteeship Council to include in its annual reports to the General Assembly a special section dealing with the implementation by the administering authorities of its *recommendations* concerning the improvement of social conditions in Trust Territories, the abolition of corporal punishment and, in particular, the action taken in pursuance of the *recommendations* contained in paragraph 5 [abolition of all discriminatory laws or practices]."

Again, paragraph 7 of General Assembly resolution 324 (IV) of 15 November 1949 recommends to the Trusteeship Council—

"to include in its annual reports to the General Assembly a special section on the manner in which the Administering Authorities have implemented resolution 36 (III) on the provision of information concerning the United Nations to the peoples of the Trust Territories, resolution 83 (IV) on educational advancement in Trust Territories, free primary education and the training of indigenous teachers, and resolution 110 (V) on higher education in Trust Territories in Africa and, generally, on the implementation of the Council's *recommendations* in the field of education".

The few illustrations given above suffice to show that in matters relating to the observance of the Charter and the obligations under the trusteeship agreements the resolutions of the General Assembly, though put in the form of recommendations, constitute general directives which the respective administering authorities are expected to observe and implement in practice. Whether these recommendations are to be considered as embodying legal obligations or quasi-legal obligations, is of little practical import in view of the power and authority of the General Assembly under the Charter in general and under the trusteeship system in particular to exercise its supervisory functions over the administration of the trust territories other than those placed under the supervision of the Security Council. In all events, they are expected to be observed and implemented by the administering authorities concerned. If the latter should fail to implement a recommendation, they must give satisfactory reasons, failing which the General

Assembly continues to call on them to implement the recommendation or recommendations in question. There may be or are one or more administering authorities who continue to disregard a given recommendation, but such failure to respect their own undertaking to co-operate, as is called for by Article 88 of the Charter or the relevant provision of a given trusteeship agreement, do not constitute proof that a recommendation of the General Assembly in and of itself has no binding force; it only demonstrates their unwillingness for one reason or another to discharge their freely accepted duty of co-operation.

Even on the general question of the binding force of the resolutions of the General Assembly, it has been affirmed in conclusion on the basis of a comprehensive study that although there is in the Charter no express undertaking to accept recommendations of the General Assembly similar to the agreement in Article 25 to accept and carry out decisions of the Security Council, "it cannot be said that the Charter specifically negates such an obligation, and it may be possible to deduce certain obligations from the Charter as a whole which it would be impossible to establish from an express undertaking". ("The Binding Force of a Recommendation of the General Assembly of the United Nations" by F. B. Sloan, in *British Year Book of International Law*, 1948, pp. 1-34, at p. 14.) This is *a fortiori* true in respect of a recommendation of the General Assembly dealing with matters connected with the trusteeship system and trusteeship agreements, under which the administering authorities have expressly undertaken to co-operate with the General Assembly and the Trusteeship Council in the exercise of their functions of supervision and control.

Moreover, the fact that under the trusteeship system, because of the differences in its voting procedure for taking decisions as compared with the unanimity rule under the mandates system both in the Council and the Assembly of the League of Nations, there is no necessity for judicial protection of the sacred trust assigned to the administering authority, does not assist in any way to demonstrate the claimed non-existence of a vital need for such protection under the mandates system. The basic structures of the two systems are different though their underlying concepts and principles correspond to each other.

For the reasons stated above, it is to be concluded that the Applicants as member States of the League of Nations under the mandates system as stipulated in Article 22 of the Covenant and implemented in respect of South West Africa by the Mandate Instrument of 17 December 1920, possess a substantive right or legal interest in the observance by the Respondent of all its obligations thereunder.

## II

Having arrived at the foregoing conclusion, I deem it incumbent upon me, if not to deal with all the issues presented in the submissions

of the two Parties, at least to reiterate and further elucidate the two cardinal principles of the mandates system, for they constitute the broad basis of the Mandate for South West Africa, as it was also that of all the other mandates. They are the pillars of the whole system. Their importance cannot be over-stressed: full account of them must be taken in determining the intentions of its authors or in interpreting any of its provisions. It is the more necessary, in my view, to emphasize them here again because the question of this Mandate in one aspect or another has been raised before the Court at least five times in the past 15 years. The instant cases alone have lasted over five years since the Applications were first filed on 4 November 1960.

One of the two principles is, in the words of Article 22, paragraph 1, of the Covenant, "the principle that the well-being and development of such peoples form a sacred trust of civilization". Manifestly, it was consideration of this basic principle which accounts for the fact that the very first obligation of the Mandatory is stated in the second paragraph of Article 2 of the mandate agreement as follows:

> "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."

Whatever power and authority the Mandatory possesses under the Mandate are clearly not conferred to serve its own ends or to enure to its own benefit or advantage, but solely for the purpose of enabling it to fulfil its obligations. Any policy it adopts to administer the mandated Territory is subject, among others, to this overriding obligation. Thus the policy of apartheid or separate development (here I refer, not to such policy as is in operation in South Africa, with which the Court is not called upon to deal, but only to that which has been and is pursued in South West Africa) should be examined in the light of this primary obligation. The laws, regulations and measures of the Union (now Republic) of South Africa are relevant to the instant cases only in so far as they, by official proclamations, have been and are applied or made applicable to the mandated Territory.

From the undisputed facts presented in the written and oral pleadings of the Parties and in the testimony and cross-examination of the witnesses and experts before the Court, it appears that this policy, as constituted by the said laws, regulations and measures applied or applicable to South West Africa, consecrates an unjustifiable principle of discrimination based on grounds of race, colour or ethnic origin in establishing the rights and duties of the inhabitants of the Territory. It is applied to the life, work, travel and residence of a non-White or a Native in the Territory. It is enforced in matters relating, for example,

to the ownership of land in the so-called Police Zone, mining and the mining industry, employment in the Railways and Harbours Administration, vocational training and education.

Quite apart from considerations of an international norm or standard of non-discrimination in general international law of today or in the particular sphere of the trusteeship system of the United Nations, such discrimination as practised by the Mandatory was consistently criticized and deprecated even in the days of the Permanent Mandates Commission of the League of Nations.

The ill effects and general detriment produced by the policy of apartheid or separate development upon the vast majority of the people (452,254 non-Whites: 73,464 Whites) of the Territory are great and far-reaching. They are neither marginal nor minimal, as has been claimed. Nor are they justified by arguments based upon the principle of protection, the principle of reciprocity, or the principle of compensation. It is a self-evident truth that a whole consists of its parts and the parts make up the whole. Any nation, community or society is made up of its individual members. It can be a contented, progressive and developed nation or community or society only when the mass of its individual members enjoy well-being and achieve progress and advancement on the basis of equality before the law. The individuals' dissatisfaction and detriment arising from their discriminatory treatment by law inevitably produce adverse effects, however marginal, on the collectivity. In view of the "sacred" mission to enable the peoples of the mandated territories "to stand by themselves under the strenuous conditions of this modern world" (Article 22 of the Covenant), and of the explicit obligations of the Mandatory, stipulated in Article 2 of the Mandate for South West Africa, to do its utmost to attain the objective of self-determination, it is not unreasonable to expect that after 40 years of administration of the Territory by the Mandatory, the people thereof would have attained a substantial degree of political development. Yet it appears from the record that with the possible exception of the Rehoboth Basters (11,257) who have a semblance of limited local self-government in their district, none of the non-White groups are granted any significant measure of the franchise. Even the Ovambos (1960 census figures: 239,363), whose group makes up more than 40 per cent. of the total population of the Territory (526,004) do not enjoy any substantial measure of local self-government. As the Odendaal Commission of Enquiry, a government-appointed body, has reported (January 1964) in connection with its recommendation to relax the control on the liquor traffic: "today they have progressed so far on the road of development that the Commission has recommended that they be granted an advanced form of self-government; and, secondly, that if the Commission failed to comply with the strong representation made by all groups, the latter would not only be bitterly disappointed but would even be aggrieved." (Odendaal Report, p. 487.)

On the other hand the White group, since the enactment of the South West Africa Constitution Act, 1925, has been exercising a right of self-government through the Legislative Assembly of South West Africa constituted by members they elect periodically. This legislative organ, to which the non-White groups are not entitled to elect representatives, is empowered to make laws for the Territory to cover all matters except those reserved in the said Act, including Native Affairs, railways and harbours, and certain other matters.

The record thus shows that the policy of apartheid or separate development, as pursued in South West Africa, as far as the non-White groups are concerned, has not been and is not compatible with the basic principle of the "sacred trust of civilization" or with the Respondent's obligation under Article 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 subject to the present Mandate".

The second cardinal principle of the mandates system is international accountability for the performance of the sacred trust. It is broadly sanctioned by paragraphs 7, 8 and 9 of Article 22 of the Covenant and more concretely by the provisions of Articles 6 and 7 of the mandate agreement. By virtue of the said Article 6 requiring the Mandatory to "make to the Council of the League of Nations an annual report to the satisfaction of the Council" on its administration of the mandated territory and similar provisions in the other Mandates, this body, by its resolution of 31 January 1923, also adopted a set of rules calling upon the Mandatories to transmit petitions from the inhabitants of each mandated territory to the Permanent Mandates Commission. In short, international accountability necessarily comprises the essential obligations of submission to international supervision and control of the mandatory's administration of the mandated territory and acceptance of the compulsory jurisdiction of the Permanent Court in any dispute between it and another Member of the League of Nations relating to the interpretation or the application of the provisions of a given mandate.

These obligations constitute a fundamental feature of the mandates system. The dissolution of the League of Nations and the disappearance of the Council and the Permanent Court did not terminate them. By virtue of Article 37 of the Statute the compulsory jurisdiction of the Permanent Court was transferred to the present Court. In regard to the obligation of international accountability as embodied in the relevant provisions of the Covenant and the Mandate for South West Africa, it had, by virtue of the principle of severability under international law, remained in existence, though latent after the disappearance of the Council and the Permanent Mandates Commission of the League. It only required an arrangement as envisaged in the resolution on mandates unanimously adopted by the Assembly of the League of Nations at its last meeting on 18 April 1946, including the concurrence of the Respondent.

It will be recalled that as early as April 1945 at San Francisco, about a year before the dissolution of the League of Nations, when the Charter of the United Nations was being drafted, the Respondent had apparently considered the proposed new international organization to be of an importance equal with, if not greater than, that of the League at Geneva, and announced to the San Francisco Conference its intention to incorporate South West Africa as part of the Union of South Africa. In the first General Assembly of the United Nations in 1946 it submitted a formal proposal of incorporation for approval. When this proposal was rejected, it, while expressing regret and disappointment, announced that it would continue to submit reports on its administration of the mandated territory of South West Africa as it had done before vis-à-vis the League of Nations.

Although the Respondent, in submitting the reports, stated that the action was voluntary on its part and for information only such as provided for by Article 73 *(e)* of the Charter of the United Nations regarding non-self-governing territories, the legal effect of its declaration and act acknowledging the General Assembly as the competent international organ in the matter of the Mandate for South West Africa, in view of its obligation of international accountability under Article 6 of the Mandate, obviously cannot be determined unilaterally by it alone (Article 7 (1)), just as the content and scope of its obligations under that instrument cannot be governed by its own interpretation of Article 7 (2) of the Mandate. Nor could the question of the validity of its subsequent declaration to discontinue further reports to the General Assembly on its administration of the mandated territory, in the actual circumstances, be resolved solely by itself without regard to the attitude and action of the General Assembly.

The General Assembly, on its part, notwithstanding its earlier hesitation (resolution XIV-I, clause 3C, of 12 February 1946), definitely undertook to exercise its powers and functions under the Charter and to deal with the matter of the Mandate for South West Africa, as evidenced by resolution 65 (I) of 14 December 1946, declaring itself "unable to accede to the incorporation of the territory of South West Africa in the Union of South Africa". By resolution 141 (II) of 1 November 1947, it took note of the Respondent's decision not to proceed with the incorporation but to maintain the *status quo*. In fact the competence and determination of the General Assembly to exercise supervision and to receive and examine reports relating to the administration of South West Africa under the Mandate were also confirmed by resolutions 227 (III) of 26 November 1948 and 337 (IV) of 6 December 1949.

It appears clear from the foregoing statements and official acts of the Mandatory as well as the General Assembly that there was, by necessary implication, consent and agreement on the part of both parties in the matter of exercise of supervisory functions by the latter of the administration of the Territory by the former.

Moreover, as an original Member of the United Nations, the Respondent had not only participated in the drafting of the Charter including Chapters XII and XIII relating to the international trusteeship system as well as Chapter XI regarding non-self-governing territories and accepted the principles underlying it, but had, by joining in the unanimous vote of the Assembly of the League of Nations to adopt the final resolution of 18 April 1946 on mandates also accepted the understanding embodied in this act. Paragraphs 3 and 4 of this resolution read:

> "3. Recognizes that on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;
>
> 4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

For by paragraph 3 of the above-cited resolution, the Respondent, like the other mandatory Powers and remaining Members of the League, recognized the correspondence to each other of the principles of the trusteeship system and the mandates system and by paragraph 4 it undertook to make an arrangement with the United Nations by mutual agreement, relating to the Mandate for South West Africa.

It is true that the arrangement which the Respondent had envisaged then was for incorporation of the mandated territory into the Union of South Africa. But, as seen earlier, the Respondent, having failed to obtain approval of the proposed incorporation, expressly undertook to continue to send annual reports on its administration in recognition of the General Assembly's supervisory power over the Mandate, because, to quote its earlier words in the Assembly of the League of Nations:

> "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities, until such time as other arrangements are agreed upon concerning the future status of the Territory."

By its own initiative the Respondent effected an arrangement with the General Assembly as seen above and as envisaged in paragraph 4 of the League resolution as cited earlier. Further, in a memorandum sent by the South Africa Legation in Washington to the Secretary-General of the United Nations on 17 October 1946, it was likewise stated, though the League had at that time already disappeared: "This responsibility

of the Union Government as Mandatory is necessarily inalienable."

The declaration of the Mandatory's representative in the League Assembly cited above was likewise repeated by the Prime Minister of the Union in a statement to the Fourth Committee of the General Assembly of the United Nations on 4 November 1946.

In view of the foregoing account of the declarations and conduct of the Respondent, expressly or implicitly recognizing the competence and the supervisory authority of the United Nations General Assembly in the matter of the Mandate of South West Africa, its present failure to continue to submit annual reports to it and to accept its supervision is incompatible not only with its basic obligation under Article 6 of the Mandate and with its undertaking toward the League Assembly at its final session but also with its obligations under the United Nations Charter and its undertaking toward the General Assembly.

*(Signed)* V. K. WELLINGTON KOO.