

DISSENTING OPINION OF Mr. ALVAREZ

[*Translation.*]

I

The questions which are now referred to the Court in the request for advisory opinion from the General Assembly of the United Nations are of great importance not only from the point of view of international law, but also from the social, economic and international political points of view.

From the *social* point of view, for the first time in the history of mankind, States, through a great change in their international outlook, have proclaimed (Article 22 of the Covenant of the League of Nations) that the well-being and the development of peoples not yet able to govern themselves form, for the civilized countries, a sacred trust of civilization. To this end, they established a new institution, the *Mandates System*. This idea has been taken up and developed in the United Nations Charter in the establishment of the *Trusteeship System*.

From the *economic* point of view, one of the concerns of our time is the improvement of under-developed territories in order to obtain the best possible results for the benefit of the general community. An economic conference has just opened where the delegates of almost every nation of the world have established a programme of technical aid to those peoples and a financial pool has been created to that effect.

From the international political point of view, the institutions of Mandate and Trusteeship have considerably modified the international position of certain continents by preparing many backward peoples for independent statehood.

But it is from the angle of *international law* that the creation of those institutions presents the greatest interest. The spirit and certain characteristics of what may be called the *new international law* have thereby been introduced in international law. In the same spirit, and by resorting to the same characteristics, it will be possible in future to create similar institutions for the general or continental interests.

II

The questions concerning the Territory of South-West Africa submitted to the Court for opinion have been complicated and even made obscure in the discussions which have taken place for several years between various Governments and in the Councils and Assemblies of the League of Nations and the United Nations.

They have been dealt with from various angles : from the angle of private law, when the nature of the mandate, its termination, the nature of the obligations, the lapsing of contracts, etc., were considered, and from the angle of international law, when sovereignty, treaties and their purposes, certain provisions of the League of Nations Covenant and the United Nations Charter were being discussed. This was done on the basis of traditional views in these matters, and by applying the classical method of interpretation of conventions and treaties.

In fact, the question is an entirely new one and comes under the new international law. It is the duty of the Court therefore to consider it, not only in the light of principles laid down in the Covenant or the Charter, but also, as we shall see later, in accordance with the nature, aims and purposes of this law.

III

For this reason, we must first consider briefly the nature of this new international law and the new criterion which must be applied to the questions before the Court.

This law is the result and outcome of the great transformations in the life of nations which have taken place since the first world war, and mostly after the 1939 cataclysm.

The *community* of States, which had hitherto remained *anarchical*, has become in fact an *organized international society*. This transformation is a fact which does not require the consecration of an international agreement. This society consists not only of States, groups and even associations of States, but also of other international entities. It has an existence and a personality distinct from those of its members. It has its own purposes. On the other hand, international relations present various aspects : political, economic, psychological, etc., and to-day possess a dynamic character, complexity and variety which they did not show formerly.

All these transformations have had a great influence on international law : a new international law has emerged. It is new for three reasons : it includes new questions in addition to traditional questions in a new form ; it rests on the basic reconstruction of fundamental principles of classical international law, and brings them into harmony with the new conditions of the life of peoples ; finally, it is based on the new social régime which has appeared, *the régime of interdependence*, which is taking the place of the individualistic régime which has, up to now, provided the basis of both national and international life. This new régime has given rise to what may be called *social interdependence* which is taking the place of traditional *individualism*. I prefer the expres-

sion "social interdependence" to "social solidarity" which has a variety of connotations.

The purposes of the new international law, based on social interdependence, differ from those of classical international law: they are to harmonize the rights of States, to promote co-operation between them and to give ample room to common interests; its purpose is also to favour cultural and social progress. In short, its purpose is to bring about what may be called *international social justice*.

To achieve these purposes this law must lay stress on the notion of *obligation* of States, not only between themselves, but also toward the international community. It must limit absolute international sovereignty of States according to the new requirements of the life of peoples, and must yield to the changing necessities of that life.

Because of these characteristics the new international law is not of an exclusively juridical character. It has also political, economic, social, and psychological characteristics.

It is not a mere abstraction, a doctrinal speculation without any foundation in fact, as some would have it. In reality it takes root in the new conditions and the new requirements of the life of peoples in numerous recent social institutions of several countries, in the international judicial conscience which has been awakened mainly since the upheaval of 1914; in the Covenant of the League of Nations and in particular in the United Nations Charter (preamble, Art. 1, 2, Chapters IV, V, IX, X, XI, XII, XIII, etc.) and in several resolutions and drafts of the Assemblies of those organizations; and in the declarations of the heads of former allied countries which have subsequently received the support of the people. It also springs from various resolutions of the last Pan-american Conferences, some of which tend to incorporate new great moral, political and social ideas, either in continental international law, or in world international law.

Therefore, the new international law has a more positive basis than classical international law, which rests on principles and rules often derived from speculation and from doctrines and customs, many of which have become obsolete.

This new law is in formation. It is for the International Court of Justice to develop it by its judgments or its advisory opinions, and in laying down valuable precedents. The theories of jurists must also share in the development of this law.

At this point, I want to stress the idea which I have already expressed in previous individual opinions: the Court must not apply international law such as it existed before the upheavals of 1914 and 1939 but must apply the law which actually exists to-day.

Indeed, since that time the international life of peoples and, consequently, the law of nations have consistently undergone profound changes and have assumed new directions and tendencies which must be taken into consideration.

The Court must, therefore, declare what is the new international law which is based upon the present requirements and conditions of the life of peoples : otherwise, it would be applying a law which is obsolete in many respects, and would disregard these requirements and conditions as well as the spirit of the Charter which is the principal source of the new international law.

In so doing, it may be said that the Court *creates* the law ; it creates it by modifying classical law ; in fact it merely *declares* what is the law to-day. Herein lies the new and important purpose of the Court.

The Court, moreover, already exercised this faculty of creating the law in its Advisory Opinion concerning Reparation for injuries suffered in the service of the United Nations ; it declared on that occasion that the United Nations was entitled to present an international claim ; until that time only States had been recognized as possessing this right.

The action of the International Court of Justice combined with the action of the Assembly of the United Nations which has very broad international powers (Article 10 of the Charter) will greatly contribute to the rapid development of the new international law.

IV

To find the solution of the questions put to the Court in the present case, let us now consider, according to the elements of the new international law, what are the characteristics of international obligations and how conventions and rules of international law are to be interpreted.

Because the new international law is based on social interdependence, many cases may be found in which States are under obligations without the beneficiary of the rights relating to these obligations being known. The beneficiary is the international community. For the same reason it is not necessary that all obligations be expressly laid down by a text. Because of the diversity and the complexity of international relations it is not possible to provide for every contingency. Many obligations result from the very nature of institutions or the requirements of social life.

On the other hand, besides *legal* obligations there are also *moral* obligations and obligations of a *political international character* or *duties*. The latter derive from the interdependence of States and the international organization. The duty to co-operate indicated in the United Nations Charter is a typical example of this last

category of obligations. The non-performance of such obligations may result in political sanctions applied by the United Nations.

In each case, the Court must decide whether a State has certain obligations or not, and what is their nature.

The conventions and rules of international law are to be interpreted by applying a criterion different from that which hitherto prevailed.

At present, the strict literal sense of the text is sought and to clarify it, recourse is had to *travaux préparatoires*. Use is also made of postulates, axioms and traditional precepts of general law, in particular of Roman law, and even natural law (except in Anglo-Saxon countries where attention is mostly paid to diplomatic precedents), and of postulates, axioms and precepts of classical international law. Not only are the immediate consequences not drawn from these elements, but deductions are made, by pushing logic too far. To this end a whole juridical technique is brought into play, and as a result, solutions are often found which are unreasonable and unacceptable to public opinion.

Important studies have recently been published by publicists of authority on the interpretation of treaties, but they follow the traditional line and, therefore, are open to criticism.

In future, postulates, axioms and general principles of law or of international law, which have hitherto been accepted may be relied upon only after they have been subject to the test of close scrutiny because many of them have become obsolete and may be replaced by others which will provide the basis of the new international law. This work of reconstruction is mainly a matter of doctrine, but it must also be effected by the International Court of Justice whenever the opportunity arises.

Extreme logic, dialectics and exclusively juridical technique must also be banished. Reality, the requirements of the life of nations, the common interest, social justice, must never be forgotten.

An isolated text may seem clear, but it may cease to be so when it is considered in relation to other texts on the same question and with the general spirit of the institution concerned. In the latter case the spirit must take precedence.

It may also happen that a text contains expressions of a clearly defined legal scope, but that, by reason of the nature of the institution, these expressions appear to have been taken in a different sense. This is exactly the case of the questions now before the Court: the words "Mandate" and "Trusteeship" have a different meaning in the Covenant and the Charter than they have in domestic law.

V

Let us now consider the nature of the Mandate conferred upon the Union of South Africa and its consequences on the questions before the Court in the light of the provisions of the Covenant of the League of Nations and of the United Nations Charter, and the spirit of the new international law. In this connexion I shall not dwell upon the declarations of the Union Government or its representatives, these declarations having been examined in the Court's Opinion.

Under Article 22 of the League of Nations Covenant the well-being and development of the inhabitants of colonies and territories which, as a consequence of the war, had ceased to be under the sovereignty of the States which formerly governed them, and were not capable of standing by themselves under the strenuous conditions of the modern world, form a sacred trust of civilization. The article goes on: "the best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it". Article 22 also lays down the conditions and guarantees for the performance of that great trust.

The United Nations Charter has not only taken up these ideas, but it has developed them (Chapters XI and XII).

Our starting point must be the existence of the sacred trust of civilization. The ideas and aims contained in this expression and the general principles of the new international law must be our compass in our quest for the answers to the questions put to the Court. We must not resort to a textual interpretation of certain articles of the Covenant or of the Charter, or to minor considerations.

Article 119 of the Versailles Treaty provides that "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions".

The Mandate over South-West Africa established by the Council of the League on December 17th, 1920, says: "The Principal Allied and Associated Powers agreed that, in accordance with Article 22 of the Covenant of the League of Nations, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory afore mentioned."

The Union thus received not an ordinary mandate, but a *sacred trust of civilization*, which is quite another thing. The act which has been created is not a *fidei-commissum*, a trust or a contract deriving from any other similar national or international institution. The ordinary Mandate is a contract mainly in the interests

of the principal, regulated by the rules of civil law, whereas the mission under consideration is an honorific and disinterested charge for the benefit of certain populations. It is an international function regulated by principles which conform to its nature. It is impossible, therefore to apply, even by analogy, the national rules applicable to the Mandate or the other institutions which I have mentioned. Nor is it a treaty between the League of Nations and the Union of South Africa. The League of Nations has undertaken no obligation and has acquired very important rights indicated in the Mandate. It has also other political rights which have not been expressly provided for, such as the right to terminate the Mandate.

VI

Very important consequences follow from the sacred trust of civilization which is a characteristic of the international Mandate and from the new international law, and these consequences will help us permit to find the answer to the questions before the Court.

Here are the most important :

1° Since the creation of the Mandates System there are in international law four categories of peoples : those which are still colonies or protectorates ; those backward civilizations which have not been placed under a Mandate or Trusteeship ; those which have been placed under one of those regimes ; and finally, those which have reached a sufficient degree of civilization and are fully developed States. In the past the peoples of the second and third categories fell, like those in the first category, under the domination of other peoples, for instance, the great Powers. Now they are protected and must be prepared for independent life.

It is only to the peoples in the fourth category that international law grants certain attributes which it does not grant to other groups, however important they may be : independence, personality, sovereignty, legal equality. These attributes are inherent in the State and are inalienable.

Because the peoples of the second and third categories which may be called "States in the making" do not yet enjoy the status and the attributes of fully-developed States, we need not attempt to determine, as has been done at length, where sovereignty resides, whether with South-West Africa or with the Union of South Africa. In fact, no question of sovereignty is raised : the question does not arise with regard to South-West Africa. As to the Union of South-Africa, she cannot exercise a sovereignty which the Mandated Territory does not possess. She has not acquired any sovereignty over the Territory. She has only certain faculties, particularly

in matters of administration, under the mission which has been entrusted to her.

2° The Court, in considering the questions before it, must examine critically the applicable postulates, the fundamental elements, and the great principles of traditional international law. In particular :

a) it must stress the pre-eminence of international law over domestic law ;

b) it must adapt the concept of sovereignty to social interdependence ;

c) it must recognize and declare that States may have certain obligations although these may not be formally expressed in a text.

3° The question of the international status of mandated territories is entirely within the scope of international law. It can in no way be said that it is part of the domestic jurisdiction of the mandatory State. The matter must therefore be regulated by principles of international law. Any act of the mandatory State contrary to international law or the nature of the Mandate institution, such as a plebiscite, a more or less disguised annexation, etc., is null and void and may even involve the liability of the State.

4° Whilst the traditional international law concerns itself with the problem of the succession of States, it does not consider succession between international organs nor does it consider succession between international institutions because these are new problems and must be dealt with according to the spirit of the new international law.

Three cases may arise :

A) An organization, for instance the League of Nations, is liquidated and is not replaced by any other one. In that case there is no doubt that all subordinate organs cease to function : the Council, the Assembly, etc. But the effects of resolutions adopted by them do not come to an end. Likewise, certain institutions created by these organs continue. Therefore, Mandates conferred continue in existence, and it is impossible to apply here the rules of private law to the effect that the Mandate terminates with the disappearance of the mandator.

As we have seen, the Mandate created by the League of Nations is a sacred trust of civilization, a social function which cannot terminate with the League of Nations, even if no other organ takes its place. The countries which have created this institution must safeguard those territories in the present and the future. Should they lose interest, these territories may fall back into the position they occupied before they were placed under Mandate : they may be colonized, even annexed by other States, including the former mandatory Power without this constituting a violation of the rules of traditional international law.

B) An international organization like the League of Nations disappears and another one is created, without any indication as to whether the latter replaced the former. If the first organization has created an institution, such as the Mandate, having for its purpose the same sacred trust of civilization as the Trusteeship created by the second institution, then the latter must be considered as succeeding the former *ipso facto*. There can be no interruption in the continuous performance of this trust.

C) The new organization shows in what conditions an institution which it has created will succeed a similar institution created by the previous organization. In the present case the Charter has declared that mandated territories will come under Trusteeship by virtue of agreements between the United Nations and the former mandatory Power (Articles 75 and 77). As long as this agreement has not been concluded the territorial status of South-West Africa is that of a mandated territory with the obligations resulting therefrom for the Union of South Africa. The Mandate, as I have already said, continues. I shall refer to this point again under No. VII.

5° The mandatory State, in this case the Union of South Africa, cannot modify unilaterally the international status of the territory under Mandate, South-West Africa, nor can it modify any one of its obligations under the Mandate.

6° The question whether the Union of South Africa was under obligation to report on its administration to the United Nations has been discussed. Some hold that this obligation existed only with regard to the League of Nations, and that the latter's disappearance has put an end to the resulting obligations. This reasoning, which is based on the application of principles regulating the mandate in private law, cannot be accepted. The United Nations has taken the place of the League of Nations and consequently the United Nations Assembly has the right to request the presentation of the report and to exercise control and supervision over the administration of the South-West African Territory. With regard to this report and control we need not confine ourselves to the obligations under the Mandate. We may also consider those resulting from the provisions of Articles 87 and 88 of the Charter.

7° The obligation for the Union of South Africa to transmit petitions from the inhabitants of South-West Africa to the United Nations has been discussed at length. This obligation derives from the nature of the Mandate conferred by the League of Nations. It need not have been expressly provided for.

8° It may happen that a mandatory State does not perform the obligations resulting from its Mandate. In that case the United Nations Assembly may make admonitions, and if necessary, revoke the Mandate. It has this right under Article 10 of the Charter.

9° The Assembly may terminate a mandate if it is established that the local population is capable of governing itself, and it may do so in spite of the contrary opinion of the mandatory State.

10° The United Nations Assembly may also terminate a mandate for political considerations. International Mandates are not, as we have already said, ordinary contracts or treaties. They are a trust, a social function. The Assembly having the faculty to confer that trust has also the faculty to revoke it. In so doing, however, it must not abuse its right.

11° The mandatory State, in this case the Union of South Africa, cannot unilaterally annex the mandated territory (South-West Africa) nor can it proclaim its independence.

12° It may happen that the mandatory Power reports that the local population over which it exercises a mandate will never be able, for anthropological or other reasons, to reach a sufficient degree of civilization to become capable of self-government. In that case, the United Nations Assembly should call for an enquiry and if these statements are proved to be true, it may authorize the mandatory Power to annex this territory, for it cannot remain without a protector or a guide.

VII

We must give special attention to the question of whether the Union of South-Africa is obliged to transform the Mandate conferred upon it by the League of Nations into Trusteeship by concluding an agreement with the United Nations. We must determine the exact scope and the spirit of Articles 75 and 77, and even of Article 80, No. 2, of the Charter.

It has been said that under these Articles the Union of South Africa has no *legal* obligation to *conclude* an agreement with the United Nations to transform its Mandate into Trusteeship, and that it only has the obligation to *negotiate* this agreement.

In my opinion the Union of South-Africa is under the legal obligation not only to negotiate this agreement, but also to conclude it. This obligation derives from the spirit of the Charter, which leaves no place for the future co-existence of the Mandates System and the Trusteeship System. The latter alone must exist as being the more appropriate.

On the other hand, the word "may" in Article 75 and the sentence "as may be placed thereunder [the Trusteeship System] by means of subsequent trusteeship agreements" in Article 77, referred to in support of the view that there is no legal obligation

to conclude such an agreement, may also apply to the case when this obligation exists.

What is to be done if no agreement can be reached? It then becomes necessary to refer to arbitration. It would not be possible to admit that, in an organized society under the régime of interdependence, an agreement which is intended to fix an important international status cannot be established solely because of the opposition, the negligence or the bad faith of one of the parties. One would then have to seek an amicable solution, or to submit the case to the International Court of Justice.

Even admitting that there is no legal obligation to conclude an agreement, there is, at least, a political obligation, a duty which derives from social interdependence and which can be sanctioned by the Assembly of the U.N.

This is the place to refer to the League of Nations Assembly Resolution of 1946, which said: "The Assembly 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."

VIII

The foregoing considerations make it possible to formulate the answers to the questions put to the Court by the United Nations Assembly:

1. The international status of the South-West African territory is the same as that which existed under the League of Nations until an arrangement is agreed upon between the Union of South Africa and the United Nations.

(a) The Union of South Africa has therefore the same international obligations as under the Mandate conferred upon her by the League of Nations and those resulting from Article 22 of the Covenant. In particular it is under obligation to report on its administration to the United Nations Assembly. The latter is qualified to exercise control in this respect. It has this faculty under Article 10 of the Charter.

(b) The provisions of Chapter XII of the Charter apply to the Territory of South-West Africa. This is in harmony with the spirit of the Charter.

The Union of South Africa under Articles 75, 77 and 80, No. 2, of the Charter, and especially in accordance with the spirit of the Charter, has the *legal* obligation to *negotiate* and *conclude* an agreement with the United Nations to place South-West Africa under Trusteeship. If this agreement cannot be made, the case must be referred to arbitration.

Even if it be admitted that South Africa is under no legal obligation to conclude this agreement, it has at any rate the political international obligation or a duty to conclude such an agreement. If it is impossible to reach such an agreement, the United Nations must then take the appropriate measures which it is empowered to take under Article 10 of the Charter.

(c) The Union of South Africa is not competent unilaterally to modify the international status of South-West Africa. This competence belongs to the Union of South Africa acting in concert with the United Nations under Article 79 of the Charter.

(Signed) A. ALVAREZ.