INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

SOUTH WEST AFRICA CASES

(ETHIOPIA *v.* SOUTH AFRICA;
LIBERIA *v.* SOUTH AFRICA)
PRELIMINARY OBJECTIONS

JUDGMENT OF 21 DECEMBER 1962

1962

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU SUD-OUEST AFRICAIN

(ÉTHIOPIE c. AFRIQUE DU SUD;
LIBÉRIA c. AFRIQUE DU SUD)
EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 21 DÉCEMBRE 1962

This Judgment should be cited as follows:

"South West Africa Cases (Ethiopia v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 319."*

Le présent arrêt doit être cité comme suit:

« *Affaires du Sud-Ouest africain (Éthiopie c. Afrique du Sud; Libéria c. Afrique du Sud), Exceptions préliminaires, Arrêt du 21 décembre 1962: C. I. J. Recueil 1962, p. 319.* »

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INTERNATIONAL COURT OF JUSTICE

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21 December 1962

SOUTH WEST AFRICA CASES

(ETHIOPIA *v.* SOUTH AFRICA; LIBERIA *v.* SOUTH AFRICA) PRELIMINARY OBJECTIONS

Preliminary question of existence of a dispute between the Parties.—Origin, nature and characteristics of Mandates System.—Mandate for South West Africa as an instrument of an international character.—Question of registration of Mandate: Article 18 of Covenant.—Article 7 of Mandate as treaty or convention within meaning of Article 37 of Statute.—Dissolution of League of Nations and survival of Mandate.—Essentiality of Article 7 of Mandate.—Capacity to invoke that Article.—Scope of Article 7 and interest of Member States in performance of Mandate.—Rule of prior diplomatic negotiation and its applicability.—Court's finding of jurisdiction.

JUDGMENT

Present: *President* WINIARSKI; *Vice-President* ALFARO; *Judges* BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, BUSTAMANTE Y RIVERO, JESSUP, MORELLI; *Judges ad hoc* Sir Louis MBANEFO, VAN WYK; *Registrar* GARNIER-COIGNET.

In the South West Africa cases,

between

the Empire of Ethiopia,
represented by
H.E. Dr. Tesfaye Gebre-Egzy,
Hon. Ernest A. Gross, Member of the New York Bar,
as Agents,
assisted by
Mr. Edward R. Moore, Assistant Attorney-General of Liberia,
Mr. Leonard S. Sandweiss, Member of the New York Bar,
as Counsel;

the Republic of Liberia,
represented by
Hon. Joseph J. F. Chesson, Attorney-General of Liberia,
Hon. Ernest A. Gross, Member of the New York Bar,
as Agents,
assisted by
Mr. Edward R. Moore, Assistant Attorney-General of Liberia,
Mr. Leonard S. Sandweiss, Member of the New York Bar,
as Counsel,

and

the Republic of South Africa,
represented by
Dr. J. P. verLoren van Themaat, S.C., Law Adviser to the Department of Foreign Affairs,
as Agent,
and by
Mr. Ross McGregor, Deputy State Attorney,
as Additional Agent,
assisted by
Mr. D. P. de Villiers, S.C., Member of the South African Bar,
Mr. G. van R. Muller, S.C., Member of the South African Bar,
as Counsel,

Mr. J. S. F. Botha, Department of Foreign Affairs,
as Adviser,

and

Mr. F. D. Tothill, Department of Foreign Affairs,
as Secretary,

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THE COURT,

composed as above,

delivers the following Judgment:

On 4 November 1960 the Registrar received two Applications, each instituting proceedings against the Government of the Union of South Africa relating to "the continued existence of the Mandate for South West Africa and the duties and performance of the Union, as Mandatory, thereunder." One of these Applications was submitted on behalf of the Government of Ethiopia; it was transmitted by a letter from the Agents who had been appointed in the case by that Government, as appears from a communication by the Deputy Prime Minister and Minister for Foreign Affairs of Ethiopia, the letter and communication being dated 28 October 1960. The other Application was submitted on behalf of the Government of Liberia; it was transmitted by a letter from the Agents who had been appointed in the case by that Government, as appears from a communication from the Ambassador of Liberia in the Netherlands, the letter and communication being dated 4 November 1960.

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

In accordance with Article 40, paragraph 2, of the Statute, the Applications were communicated to the Government of the Union of South Africa. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

Time-limits for the filing of the Memorial of Ethiopia and the Memorial of Liberia, and for the filing of the Counter-Memorials of the Union of South Africa, were fixed by two Orders of 13 January 1961. By letters dated 28 March 1961, the Agent of the Government of Ethiopia, on the one hand, requested that a time-limit be fixed within which his Government might notify its intention to exercise the right to choose a Judge *ad hoc* and might indicate the name of the person chosen; and the Agent of the Government of Liberia, on the other hand, made the same request in respect of that Government. Seised of these two requests, and having taken cognizance of the two Memorials which had been filed on 15 April 1961, the Court, considering that the two applicant Governments were in the same interest and were therefore, so far as the choice of a Judge *ad hoc* was concerned, to be reckoned as one party only, by Order of 20 May 1961, joined the proceedings in the two cases, and fixed the time-limit as requested.

On 30 November 1961, within the time-limit fixed for the presentation of its first pleading, the Government of South Africa filed

Preliminary Objections. Accordingly, an Order of 5 December 1961 recorded that by virtue of the provisions of Article 62, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended and fixed 1 March 1962 as the time-limit within which the Governments of Ethiopia and Liberia might present a written statement of their observations and submissions on the objections.

The statement having been presented within the prescribed time-limit, the cases became ready for hearing on 1 March 1962 in respect of the Preliminary Objections.

Pursuant to Article 31, paragraph 3, of the Statute, and the Order of the Court of 20 May 1961, the Governments of Ethiopia and Liberia, acting in concert, chose Sir Louis Mbanefo, Chief Justice of the Eastern Region of Nigeria, to sit as Judge *ad hoc*. In accordance with the same Article, the Government of South Africa chose the Honourable J. T. van Wyk, Judge of the Appellate Division of the Supreme Court of South Africa, to sit as Judge *ad hoc*.

On 2-5, 8-11, 15-17, and 19 and 22 October 1962, hearings were held in the course of which the Court heard the oral arguments and replies of Mr. verLoren van Themaat, Agent, Mr. de Villiers and Mr. Muller, Counsel, on behalf of the Government of South Africa; and of the Honourable Ernest A. Gross, Agent, and the Honourable Edward R. Moore, Counsel, on behalf of the Governments of Ethiopia and Liberia.

In the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia,

In the Applications:

> "May it please the Court, to adjudge and declare, whether the Government of the Union of South Africa is present or absent and after such time limitations as the Court may see fit to fix, that,
>
> A. South West Africa is a Territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920; and that the aforesaid Mandate is a treaty in force, within the meaning of Article 37 of the Statute of the International Court of Justice.
>
> B. The Union of South Africa remains subject to the international obligations set forth in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, and that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union is under an obligation to

submit to the supervision and control of the General Assembly with regard to the exercise of the Mandate.

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

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

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

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

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

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

I. The Union has exercised powers of administration and legislation over the Territory inconsistent with the international status of the Territory; that the foregoing action by the Union is in

violation of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty to refrain from acts of administration and legislation which are inconsistent with the international status of the Territory.

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

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

The Applicant reserves the right to request the Court to declare and adjudge with respect to such other and further matters as the Applicant may deem appropriate to present to the Court.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Application, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations";

In the Memorials:

"Upon the basis of the foregoing allegations of fact, supplemented by such facts as may be adduced in further testimony before this Court, and the foregoing statements of law, supplemented by such other statements of law as may be hereinafter made, may it please the Court to adjudge and declare, whether the Government of the Union of South Africa is present or absent, that:

1. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by his Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920;

2. the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;

3. the Union, in the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practised *apartheid*, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as

stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory;

4. the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such articles;

5. the Union, by word and by action, in the respects set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the actions summarized in Section C of Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the Territory;

6. the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory;

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

8. the Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that the Union has the duty to transmit such petitions to the General Assembly;

9. the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such

attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

The Applicant reserves the right to request the Court to declare and adjudge in respect to events which may occur subsequent to the date this Memorial is filed, including any event by which the Union's juridical and constitutional relationship to Her Britannic Majesty undergoes any substantial modification.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Memorial, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa,

In the Preliminary Objections:

"For all or any of the reasons set out in these Preliminary Objections, the Government of the Republic of South Africa submits 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; and prays that the Court may adjudge and determine accordingly."

On behalf of the Governments of Ethiopia and Liberia,

In the written Observations on the Preliminary Objections:

"May it please this Honourable Court to dismiss the Preliminary Objections raised by the Government of the Republic of South Africa in the South West Africa Cases, and to adjudge and declare that the Court has juridiction to hear and adjudicate the questions of law and fact raised in the Applications and Memorials of the Governments of Ethiopia and Liberia in these Cases."

In the oral proceedings the following Submissions were presented by the Parties:

On behalf of the Government of South Africa,

at the hearing on 11 October 1962:

"For all or any one or more of the reasons set out in its written and oral statements, the Government of the Republic of South Africa submits that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings, and that the Court has no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the Applications and Memorials, more particularly because:

Firstly, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is no longer a 'treaty or con-

vention in force' within the meaning of Article 37 of the Statute of the Court, this submission being advanced

(a) with respect to the said Mandate Agreement as a whole, including Article 7 thereof, and

(b) in any event, with respect to Article 7 itself;

Secondly, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa;

Thirdly, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;

Fourthly, the alleged conflict or disagreement is as regards its state of development not a 'dispute' which 'cannot be settled by negotiation' within the meaning of Article 7 of the Mandate for South West Africa."

On behalf of the Governments of Ethiopia and Liberia,

at the hearing on 17 October 1962:

"May it please the Court to dismiss the Preliminary Objections raised by the Government of the Republic of South Africa in the South West Africa cases, and to adjudge and declare that the Court has jurisdiction to hear and adjudicate the questions of law and fact raised in the Applications and Memorials of the Governments of Ethiopia and Liberia in these cases."

Questions having been put to the Parties by two Judges, the Court decided that the answers to them should be given after the oral rejoinder, first on behalf of the Republic of South Africa and then on behalf of Ethiopia and Liberia; and that, in the same order, the Agents should be called upon to indicate whether those questions and the answers given to them had led them to amend their respective submissions and, if so, to present the amended submissions.

Availing themselves of this decision, the Agents of the Parties gave their answers on 22 October 1962. The Agent of the Republic of South Africa amended the Submissions which he had read at the hearing on 11 October by substituting the following paragraph for the paragraph commencing with the word "Firstly":

"Firstly, the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this Submission being advanced

(a) with respect to the Mandate as a whole, including Article 7 thereof; and

(b) in any event, with respect to Article 7 itself."

At the hearing on 22 October 1962, the Agent of Ethiopia and Liberia stated that he did not intend to amend his Submissions.

* * *

To found the jurisdiction of the Court in the proceedings, the Applicants, having regard to Article 80, paragraph 1, of the Charter of the United Nations, relied on Article 7 of the Mandate of 17 December 1920 for South West Africa, and Article 37 of the Statute of the Court. In response to the Applications and Memorials of Ethiopia and Liberia, the Government of South Africa filed Preliminary Objections to the jurisdiction of the Court. It is these Objections which call for consideration in the present phase of the proceedings.

Before undertaking this task, however, the Court finds it necessary to decide a preliminary question relating to the existence of the dispute which is the subject of the Applications. The view has been advanced that if no dispute within the purview of Article 7 of the Mandate and Articles 36 and 37 of the Statute of the Court exists in fact, a conclusion of incompetence or *fin de non-recevoir* must follow.

It is to be noted that this preliminary question really centres on the point as to the existence of a dispute between the Applicants and the Respondent, irrespective of the nature and subject of the dispute laid before the Court in the present case. In the case of the *Mavrommatis Palestine Concessions* (P.C.I.J., Series A, No. 2, p. 11) the Permanent Court defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons". The said Judgment, in proceeding to examine the nature of the dispute, enunciates this definition, only after establishing that the conditions for the existence of a dispute are fulfilled. In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.

* * *

Inasmuch as the grounds on which the Preliminary Objections rely are generally connected with the interpretation of the Mandate

Agreement for South West Africa, it is also necessary at the outset to give a brief account of the origin, nature and characteristics of the Mandates System established by the Covenant of the League of Nations.

Under Article 119 of the Treaty of Versailles of 28 June 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions. The said Powers, shortly before the signature of the Treaty of Peace, agreed to allocate them as Mandates to certain Allied States which had already occupied them. The terms of all the "C" Mandates were drafted by a Committee of the Supreme Council of the Peace Conference and approved by the representatives of the Principal Allied and Associated Powers in the autumn of 1919, with one reservation which was subsequently withdrawn. All these actions were taken before the Covenant took effect and before the League of Nations was established and started functioning in January 1920. The terms of each Mandate were subsequently defined and confirmed by the Council in conformity with Article 22 of the Covenant.

The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of "a sacred trust of civilisation" laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights.

These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote "the well-being and development" of the people of the territory under Mandate.

* * *

As has already been pointed out, Ethiopia and Liberia indicated in their Applications the provisions on which they founded the jurisdiction of the Court to hear and determine the dispute which they referred to it; to this the Republic of South Africa replied with a denial of jurisdiction.

The issue of the jurisdiction of the Court was raised by the Respondent in the form of four Preliminary Objections. Its sub-

missions at the end of its written and oral statements are substantially the same, except that on the latter occasion the grounds on which the respective objections are based were summarized under each Objection, and, with reference to the submissions in the first Preliminary Objection, the Respondent introduced a modification on 22 October 1962, as a consequence of its replies to questions put to the Parties by Members of the Court. The Court will deal first with this modification.

The amended text of the First Objection reads:

> "Firstly, the Mandate for South West Africa *has never been, or at any rate* is since the dissolution of the League of Nations no longer, a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this Submission being advanced
>
> *(a)* with respect to the Mandate as a whole, including Article 7 thereof; and
>
> *(b)* in any event, with respect to Article 7 itself."

The amendment consists in the addition of the italicized words. Counsel for the Respondent made a statement as a preface to his amendment of 22 October 1962. From this statement it appears that originally the Respondent had always considered or assumed that the Mandate for South West Africa had been a "treaty or convention in itself, that is, an international agreement between the Mandatory on the one hand, and, on the other, the Council representing the League and/or its Members"; and that it had stated several times "that that proposition could be taken to be common cause as related to the period of the lifetime of the League"; but "that the alternative view might well be taken that in defining the terms of the Mandate, the Council was taking executive action in pursuance of the Covenant (which of course was a convention) and was not entering into an agreement which would itself be a treaty or convention". At the same time, the statement added: "This view, we put it no higher than a view that might be taken, would regard the Council's Declaration as setting forth a resolution of the Council, which would, like any other valid resolution of the Council, owe its legal force to the fact of having been duly resolved by the Council in the exercise of powers conferred upon it by the Covenant."

In the Court's opinion, this modified view is not well-founded for the following reasons. For its confirmation, the Mandate for South West Africa took the form of a resolution of the Council of the League but obviously it was of a different character. It cannot be correctly regarded as embodying only an executive action in pursuance of the Covenant. The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention. The Preamble of the Mandate itself shows this character. The agreement

referred to therein was effected by a decision of the Principal Allied and Associated Powers including Great Britain taken on 7 May 1919 to confer a Mandate for the Territory on His Britannic Majesty and by the confirmation of its acceptance on 9 May 1919 by the Union of South Africa. The second and third paragraphs of the Preamble record these facts. It is further stated therein that "His Britannic Majesty, for and on behalf of the Government of the Union of South Africa ... has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions". These "provisions" were formulated "in the following terms".

The draft Mandate containing the explicit terms was presented to the Council of the League in December 1920 and, with a few changes, was confirmed on 17 December 1920. The fourth and final paragraph of the Preamble recites the provisions of Article 22, paragraph 8, of the Covenant, and then "confirming the said Mandate, defines its terms as follows: ...".

Thus it can be seen from what has been stated above that this Mandate, like practically all other similar Mandates, is a special type of instrument composite in nature and instituting a novel international regime. It incorporates a definite agreement consisting in the conferment and acceptance of a Mandate for South West Africa, a provisional or tentative agreement on the terms of this Mandate between the Principal Allied and Associated Powers to be proposed to the Council of the League of Nations and a formal confirmation agreement on the terms therein explicitly defined by the Council and agreed to between the Mandatory and the Council representing the League and its Members. It is an instrument having the character of a treaty or convention and embodying international engagements for the Mandatory as defined by the Council and accepted by the Mandatory.

The fact that the Mandate is described in its last paragraph as a Declaration [*exemplaire* in the French text] is of no legal significance. The Mandates confirmed by the Council of the League of Nations in the course of 1922 are all called instruments [*actes* in the French text], such as the French Mandate for Togoland, the British Mandate for the Cameroons, the Belgian Mandate for East Africa (Ruanda-Urundi), etc. Terminology is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States and of international organizations and in the jurisprudence of international courts, there exists a great variety of usage; there are many different types of acts to which the character of treaty stipulations has been attached.

Moreover, the fact that the Mandate confirmed by the Council of the League embodies a provision that it "shall be deposited in the archives of the League of Nations" and that "certified copies shall be forwarded by the Secretary-General of the League of Nations

to all Powers Signatories of the Treaty of Peace with Germany", clearly implies that it was intended and understood to be an international treaty or convention embodying international engagements of general interest to the Signatory Powers of the German Peace Treaty.

It has been argued that the Mandate in question was not registered in accordance with Article 18 of the Covenant which provided: "No such treaty or international engagement shall be binding until so registered." If the Mandate was *ab initio* null and void on the ground of non-registration it would follow that the Respondent has not and has never had a legal title for its administration of the territory of South West Africa; it would therefore be impossible for it to maintain that it has had such a title up to the discovery of this ground of nullity. The fact is that Article 18 provided for registration of "Every treaty or international engagement entered into *hereafter* by any Member of the League" and the word "hereafter" meant after 10 January 1920 when the Covenant took effect, whereas the Mandate for South West Africa, as stated in the preamble of the instrument, had actually been conferred on and accepted by the Union of South Africa more than seven months earlier on 7-9 May 1919; and its terms had been provisionally agreed upon between the Principal Allied and Associated Powers and the Mandatory, in August 1919. Moreover, Article 18, designed to secure publicity and avoid secret treaties, could not apply in the same way in respect of treaties to which the League of Nations itself was one of the Parties as in respect of treaties concluded among individual Member States. The Mandate for South West Africa, like all the other Mandates, is an international instrument of an institutional character, to which the League of Nations, represented by the Council, was itself a Party. It is the implementation of an institution in which all the Member States are interested as such. The procedure to give the necessary publicity to the Mandates including the one under consideration was applied in view of their special character, and in any event they were published in the *Official Journal* of the League of Nations.

* * *

Since the Mandate in question had the character of a treaty or convention at its start, the next relevant question to consider is whether this treaty or convention, with respect to the Mandate as a whole including Article 7 thereof, or with respect to Article 7 itself, is still in force. The Respondent contends that it is not in force, and this contention constitutes the essence of the First Preliminary Objection. It is argued that the rights and obligations under the Mandate in relation to the administration of the territory of South

West Africa being of an objective character still exist, while those rights and obligations relating to administrative supervision by the League and submission to the Permanent Court of International Justice, being of a contractual character, have necessarily become extinct on the dissolution of the League of Nations which involved as a consequence the ending of membership of the League, leaving only one party to the contract and resulting in the total extinction of the contractual relationship.

The Respondent further argues that the casualties arising from the demise of the League of Nations are not therefore confined to the provisions relating to supervision by the League over the Mandate but include Article 7 by which the Respondent agreed to submit to the jurisdiction of the Permanent Court of International Justice in any dispute whatever between it as Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate. If the object of Article 7 of the Mandate is the submission to the Court of disputes relating to the interpretation or the application of the Mandate, it naturally follows that no Application based on Article 7 could be accepted unless the said Mandate, of which Article 7 is a part, is in force. This proposition, moreover, constitutes the very basis of the Applications to the Court.

Similar contentions were advanced by the Respondent in 1950, and the Court in its Advisory Opinion ruled:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, page 133.)

After observing that the international obligations assumed by the Union of South Africa were of two kinds, those "directly related to the administration of the Territory" and corresponding "to the sacred trust of civilization referred to in Article 22 of the Covenant" and those "related to the machinery for implementation" and "closely linked to the supervision and control of the League", corresponding to the " 'securities for the performance of this trust' referred to in the same article", the Court went on to say with reference to the second group of obligations:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision... It cannot be admitted that the obligation

to submit to supervision has disappeared merely because the supervisory organ has ceased to exist..." (*Ibid.*, page 136.)

The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate.

That the League of Nations in ending its own existence did not terminate the Mandates but that it definitely intended to continue them by its resolution of 18 April 1946 will be seen later when the Court states its views as to the true effect of the League's final act of dissolution on the Mandates.

What is relevant to the issue under consideration is the finding of the Court in the same Advisory Opinion on the effect of the dissolution of the League of Nations on Article 7 of the Mandate. After recalling the provisions of this Article, the Court stated:

"Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions." (*Ibid.*, page 138.)

It is also to be recalled that while the Court was divided on the other points involved in the questions put to it for an Advisory Opinion, it was unanimous on the finding that Article 7 of the Mandate relating to the obligation of the Union of South Africa to submit to the compulsory jurisdiction of this Court is still "in force".

The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950.

The Court finds that, though the League of Nations and the Permanent Court of International Justice have both ceased to exist, the obligation of the Respondent to submit to the compulsory jurisdiction of that Court was effectively transferred to this Court before the dissolution of the League of Nations. By its own resolution of 18 April 1946 the League ceased to exist from the following day, i.e. 19 April 1946. The Charter of the United Nations, in accordance with Article 110 thereof, entered into force on 24 October 1945. South Africa, Ethiopia and Liberia, the three Parties to the present proceedings, deposited their ratifications respectively on 7 November 1945, 2 November 1945 and 13 November 1945,

and in accordance with paragraph 4 of the said Article 110 all became original Members of the United Nations from the respective dates. They have since been subjected to the obligations, and entitled to the rights, under the Charter. One of these obligations is embodied in Article 37 of the Statute of this Court, which by Article 92 of the Charter "forms an integral part of the present Charter", and by Article 93 thereof "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". By the effect of these provisions the Respondent has bound itself since 7 November 1945, when the League of Nations and the Permanent Court were still in existence and when therefore Article 7 of the Mandate was also in full force, to accept the compulsory jurisdiction of this Court in lieu of that of the Permanent Court, to which it had originally agreed to submit under Article 7 of the Mandate.

This transferred obligation was voluntarily assumed by the Respondent when joining the United Nations. There could be no question of lack of consent on the part of the Respondent as regards this transfer to this Court of the Respondent's obligation under Article 7 of the Mandate to submit to the compulsory jurisdiction of the Permanent Court. The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above.

* * *

The Second Objection of the Respondent consists mainly of an argument which has been advanced in support of the First Objection. It centres on the term "another Member of the League of Nations" in Article 7, of which paragraph 2 reads:

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

It is contended that since all Member States of the League necessarily lost their membership and its accompanying rights when the League itself ceased to exist on 19 April 1946, there could no longer be "another Member of the League of Nations" today. According to this contention, even assuming that Article 7 of the Mandate is still in force as a treaty or convention within the meaning of Article 37 of the Statute, no State has "locus standi" or is qualified to invoke the jurisdiction of this Court in any dispute with the Respondent as Mandatory.

This contention is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.

In the first place, judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. The essence of this system, as conceived by its authors and embodied in Article 22 of the Covenant of the League of Nations, consisted, as stated earlier, of two features: a Mandate conferred upon a Power as "a sacred trust of civilisation" and the "securities for the performance of this trust". While the faithful discharge of the trust was assigned to the Mandatory Power alone, the duty and the right of ensuring the performance of this trust were given to the League with its Council, the Assembly, the Permanent Mandates Commission and all its Members within the limits of their respective authority, power and functions, as constituting administrative supervision, and the Permanent Court was to adjudicate and determine any dispute within the meaning of Article 7 of the Mandate. The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the "sacred trust" toward the inhabitants of the mandated territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.

The *raison d'être* of this essential provision in the Mandate is obvious. Without this additional security the supervision by the League and its Members could not be effective in the last resort. For example, under Article 6 of the Mandate for South West Africa:

> "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

In actual operation the Council when satisfied with the report on the recommendation of the Permanent Mandates Commission would approve the report. If some Member of the Council had doubts on some point or points in the report, explanations would be asked from the representative of the Mandatory present. If the explanations were considered satisfactory, approval of the annual report would follow. In either case the approval meant the unanimous agreement of all the representatives including that of the Mandatory who, under Article 4, paragraph 5, of the Covenant,

was entitled to send a representative to such a meeting to take part in the discussion and to vote. But if some measure proposed to the Mandatory on the recommendation of the Permanent Mandates Commission in the interest of the inhabitants of the mandated territory and within the terms of the Mandate and of Article 22 of the Covenant should be opposed by the Mandatory, it could not be adopted by the Council. Or if the Mandatory should adopt some measure in connection with its administration of the Territory notwithstanding the objection of the Permanent Mandates Commission and the Council that it was a violation of the Mandate, and should persist in carrying it out, a conflict would occur. This possibility is not a mere conjecture or hypothesis. As a matter of fact, the Respondent had more than once intimated its desire to incorporate South West Africa into the Union and the Permanent Mandates Commission of the League each time objected to it as being contrary to the Mandate; and the same idea of the Mandatory Power was also conveyed to the United Nations in 1946. If it should have attempted in the days of the League to carry out the idea contrary to paragraph 1 of Article 7, an important dispute would arise between it and the Council of the League.

Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory. It could of course ask for an advisory opinion of the Permanent Court but that opinion would not have binding force, and the Mandatory could continue to turn a deaf ear to the Council's admonitions. In such an event the only course left to defend the interests of the inhabitants in order to protect the sacred trust would be to obtain an adjudication by the Court on the matter connected with the interpretation or the application of the provisions of the Mandate. But neither the Council nor the League was entitled to appear before the Court. The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication. It was for this all-important purpose that the provision was couched in broad terms embracing "any dispute whatever ... between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate ... if it cannot be settled by negotiation". It is thus seen what an essential part Article 7 was intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory.

In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly

conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision.

The third reason for concluding that Article 7 with particular reference to the term "another Member of the League of Nations" continues to be applicable is that obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different Mandates as far as it was practically feasible or operable with reference to the obligations of the Mandatory Powers and therefore to maintain the rights of the Members of the League, notwithstanding the dissolution of the League itself. This agreement is evidenced not only by the contents of the dissolution resolution of 18 April 1946 but also by the discussions relating to the question of Mandates in the First Committee of the Assembly and the whole set of surrounding circumstances which preceded, and prevailed at, the session. Moreover, the Court sees no valid ground for departing from the conclusion reached in the Advisory Opinion of 1950 to the effect that the dissolution of the League of Nations has not rendered inoperable Article 7 of the Mandate. Those States who were Members of the League at the time of its dissolution continue to have the right to invoke the compulsory jurisdiction of the Court, as they had the right to do before the dissolution of the League. That right continues to exist for as long as the Respondent holds on to the right to administer the territory under the Mandate.

The Assembly of the League of Nations met in April 1946 specially to arrange for the dissolution of the League. Long before the session important events had taken place which bore a direct influence on its course of action at the indicated session. The Charter of the United Nations with its Chapter XI on non-self-governing territories and Chapters XII and XIII on the new trusteeship system embodying principles corresponding to those in Article 22 of the Covenant on Mandates and the Mandates System entered into force in October 1945 and the United Nations began to operate in January 1946, and the General Assembly held its first session in the following February. When the Assembly of the League actually met subsequently in April of the same year, it had full knowledge of these events. Therefore before it finally passed the dissolution resolution, it took special steps to provide for the continuation of the Mandates and the Mandate System "until other arrangements have been agreed between the United Nations and the respective mandatory Powers". It was fully realized by all the representatives attending the Assembly session that the operation of the Mandates during the transitional period was bound to be handicapped by legal technicalities and formalities. Accordingly they took special steps to meet them. For example, these special circumstances show that the assembled

representatives did not attach importance to the letter of the constitutional procedure. Under the Covenant the role of the Council in the Mandates System was preponderant. But the Council held no meeting to deal with the question of what should be done with the Mandates after the League's dissolution. Instead the Assembly by a resolution of 12 April 1946 attributed to itself the responsibilities of the Council. The resolution reads:

> "The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council."

On the basis of this resolution, the Assembly also approved the end of the Mandates for Syria, Lebanon and Trans-Jordan.

To provide for the situation certain to arise from the act of dissolution, and to continue the Mandates on the basis of a sacred trust, prolonged discussions were held both in the Assembly and in its First Committee to find ways and means of meeting the difficulties and making up for the imperfections as far as was practicable. It was in these circumstances that all the Mandatory Powers made declarations of their intentions relating to their respective Mandates. Each of the delegates of the Mandatory Powers present solemnly expressed their intention to continue to administer in each case the Territory: for the United Kingdom, "in accordance with the general principles of the existing mandates"; for France, "to pursue the execution of the mission entrusted to it by the League of Nations"; for New Zealand, "in accordance with the terms of the Mandate"; for Belgium, to "remain fully alive to all the obligations devolving on members of the United Nations under Article 80 of the Charter"; for Australia, "in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants". The statement by the delegate of South Africa, at the second plenary meeting of the Assembly on 9 April 1946 is particularly clear. After announcing that

> "... it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South West Africa a status under which it would be internationally recognized as an integral part of the Union",

he continues:

> "In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the

Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. 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."

There could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate for South West Africa, including Article 7, after the dissolution of the League of Nations.

It was on the basis of the declarations of the Mandatory Powers as well as on the views expressed by the other Members that the League Assembly unanimously adopted its final resolution of 18 April 1946, the last two paragraphs of which 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."

The Chinese delegate, in introducing the resolution in the Assembly relating to the possible effect of the League's dissolution on the problem of the Mandates from which the two passages are taken, stated:

"It was gratifying to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers had announced their intention to administer the territories under their control in accordance with their obligations under the mandates system until other arrangements were agreed upon."

The French delegate in supporting the resolution said that he wished:

"to stress once more the fact that all territories under the mandate of his Government would continue to be administered in the spirit of the Covenant and of the Charter".

Professor Bailey of Australia, Rapporteur, speaking as delegate of his country, welcomed:

> "the initiative of the Chinese delegation in moving the resolution, which he supported. The Australian delegation had made its position clear in the Assembly—namely, that Australia did not regard the dissolution of the League as weakening the obligations of countries administering mandates. They regarded the obligation as still in force and would continue to administer their mandated territories in accordance with the provisions of the mandates for the well-being of the inhabitants."

The delegate of the United Kingdom made it even clearer that there was agreement by all the Mandatory Powers when he "formally seconded the resolution on behalf of his Government":

> "It had been settled in consultation and agreement by all countries interested in mandates and he thought it could therefore be passed without discussion and with complete unanimity."

It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the meeting, "will necessarily preclude complete compliance with the letter of the Mandate", i.e. notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words the common understanding of the Member States in the Assembly —including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, however imperfect the whole system would be after the League's dissolution, and as much as it would be operable, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates. Manifestly, this continuance of obligations under the Mandate could not begin to operate until the day after the dissolution of the League of Nations and hence the literal objections derived from the words "another Member of the League of Nations" are not meaningful, since the resolution of 18 April 1946 was adopted precisely with a view to averting them and continuing the Mandate as a treaty between the Mandatory and the Members of the League of Nations.

In conclusion, any interpretation of Article 7 or more particularly the term therein "another Member of the League of Nations" must take into consideration all of the relevant facts and circumstances relating to the act of dissolution of the League, in order to ascertain the true intent and purpose of the Members of the Assembly in adopting the final resolution of 18 April 1946.

In further support of the finding of an agreement at the time of the dissolution of the League to maintain the *status quo* as far as possible in regard to the Mandates pending other arrangements agreed between the United Nations and the respective Mandatory Powers, it should be stated that the interval was expected to be of short duration and that in due course the different Mandates would be converted by mutual agreement into trusteeship agreements under the Charter of the United Nations. This expectation has been realized and the only exception is the Respondent's Mandate for South West Africa. In the light of this fact the finding of an agreement appears all the more justified.

To deny the existence of the agreement it has been said that Article 7 was not an essential provision of the Mandate instrument for the protection of the sacred trust of civilization. If therefore Article 7 were not an essential tool in the sense indicated, the claim of jurisdiction would fall to the ground. In support of this argument attention has been called to the fact that three of the four "C" Mandates, when brought under the trusteeship provisions of the Charter of the United Nations, did not contain in the respective Trusteeship Agreements any comparable clause and that these three were the Trusteeship Agreements for the territories previously held under Mandate by Japan, Australia and New Zealand. The point is drawn that what was essential the moment before was no longer essential the moment after, and yet the principles under the Mandates system corresponded to those under the Trusteeship system. This argument apparently overlooks one important difference in the structure and working of the two systems and loses its whole point when it is noted that under Article 18 of the Charter of the United Nations, "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting", whereas the unanimity rule prevailed in the Council and the Assembly of the League of Nations under the Covenant. Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State, and the necessity for invoking the Permanent Court for judicial protection which prevailed under the Mandates system is dispensed with under the Charter.

For the reasons stated, the First and Second Objections must be dismissed.

* * *

The Third Preliminary Objection consists essentially of the proposition that the dispute brought before the Court by the Appli-

cants is not a dispute as envisaged in Article 7 of the Mandate—more particularly in that the said conflict or disagreement does not affect any material interests of the Applicant States or their nationals.

In support of this proposition, the Respondent contends that the word "dispute" must be given its generally accepted meaning in a context of a compulsory jurisdiction clause and that, when so interpreted, it means a disagreement or conflict between the Mandatory and another Member of the League concerning the legal rights and interests of such other Member in the matter before the Court; that "the obligations imposed for the benefit of the inhabitants would have been owed to the League on whose behalf the Mandatory undertook to exercise the Mandate" and that "League Members would then, by virtue of their membership, be entitled to participate in the League's supervision of the Mandate, but would individually, *vis-à-vis* the Mandatory, have no legal right or interest in the observance by the Mandatory of its duties to the inhabitants".

The question which calls for the Court's consideration is whether the dispute is a "dispute" as envisaged in Article 7 of the Mandate and within the meaning of Article 36 of the Statute of the Court.

The Respondent's contention runs counter to the natural and ordinary meaning of 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 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. 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.

Nor can it be said, as argued by the Respondent, that any broad interpretation of the compulsory jurisdiction in question would be incompatible with Article 22 of the Covenant on which all Mandates are based, especially relating to the provisions of Article 7, because Article 22 did not provide for the Mandatory's submission to the Permanent Court in regard to its observance of the Mandate. But

Article 7, paragraph 2, is clearly in the nature of implementing one of the "securities for the performance of this trust", mentioned in Article 22, paragraph 1. It was embodied in the draft agreement among the Principal Allied and Associated Powers and proposed to the Council of the League by the representative of the United Kingdom as original Mandatory on behalf of South Africa, the present Mandatory for South West Africa. The right to take legal action conferred by Article 7 on Member States of the League of Nations is an essential part of the Mandate itself and inseparable from its exercise. Moreover, Article 7 reads: "The Mandatory agrees that...", so that there could be no doubt about the scope and effect of the provision at the time of its stipulation.

While Article 6 of the Mandate under consideration provides for administrative supervision by the League, Article 7 in effect provides, with the express agreement of the Mandatory, for judicial protection by the Permanent Court by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose in each of the other Members of the League. Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important.

The foregoing considerations and reasons lead to the conclusion that the present dispute is a dispute as envisaged in Article 7 of the Mandate and that the Third Preliminary Objection must be dismissed.

* * *

The Court will now consider the Fourth and last Preliminary Objection raised by the Respondent. In essence it consists of the proposition that if it is a dispute within the meaning of Article 7, it is not one which cannot be settled by negotiation with the Applicants and that there have been no such negotiations with a view to its settlement. The Applicants' reply is to the effect that repeated negotiations have taken place over a period of more than ten years between them and the other Members of the United Nations holding the same views as they, on the one hand, and the Respondent, on the other, in the Assembly and various organs of the United Nations, and that each time the negotiations reached a deadlock, due to the conditions and restrictions the Respondent placed upon them. The question to consider, therefore, is: What are the chances of success of further negotiations between the Parties in the present cases for reaching a settlement?

In considering the question, it is to be noted, first, that the alleged impossibility of settling the dispute obviously could only refer to the time when the Applications were filed. In the second place, it

should be pointed out that behind the present dispute there is another and similar disagreement on points of law and fact—a similar conflict of legal views and interests—between the Respondent on the one hand, and the other Members of the United Nations, holding identical views with the Applicants, on the other hand. But though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical. Even a cursory examination of the views, propositions and arguments consistently maintained by the two opposing sides, shows that an impasse was reached before 4 November 1960 when the Applications in the instant cases were filed, and that the impasse continues to exist. The actual situation appears from a letter of 25 March 1954 from the Permanent Representative of the Union of South Africa to the Chairman of the Committee on South West Africa:

> "As the terms of reference of your Committee appear to be even more inflexible than those of the *Ad Hoc* Committee the Union Government are doubtful whether there is any hope that new negotiations within the scope of your Committee's terms of reference will lead to any positive results."

This situation remains unchanged as appears clearly from subsequent communications addressed to the Chairman of the Committee on South West Africa on 21 May 1955 and 21 April 1956.

It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction. The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement.

In this respect it is relevant to cite a passage from the Judgment of the Permanent Court in the case of the *Mavrommatis Palestine Concessions* (P.C.I.J., Ser. A, No. 2, p. 13) which supports the view stated. The Court said in respect of a similar objection advanced by the Respondent in that case to the compulsory jurisdiction under Article 26 of the Palestine Mandate, which corresponds to Article 7 of the Mandate for South West Africa:

> "The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally

a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can be therefore no doubt that the dispute cannot be settled by diplomatic negotiation.

But it is equally true that if the diplomatic negotiations between the Governments commence at a point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case."

Now in the present cases, it is evident that a deadlock on the issues of the dispute was reached and has remained since, and that no modification of the respective contentions has taken place since the discussions and negotiations in the United Nations. It is equally evident that "there can be no doubt", in the words of the Permanent Court, "that the dispute cannot be settled by diplomatic negotiation", and that it would be "superfluous" to undertake renewed discussions.

It is, however, further contended by the Respondent that the collective negotiations in the United Nations are one thing and direct negotiations between it and the Applicants are another, and that no such direct negotiations have ever been undertaken by them. But in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties.

Moreover, diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation. The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition.

For the reasons stated above, the Fourth Objection like the preceding three Objections is not well-founded and should also be dismissed.

* * *

The Court concludes that Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation. Consequently the Court is competent to hear the dispute on the merits.

For these reasons,

THE COURT,

by eight votes to seven,

finds that it has jurisdiction to adjudicate upon the merits of the dispute.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of December, one thousand nine hundred and sixty-two, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Empire of Ethiopia, the Government of the Republic of Liberia and the Government of the Republic of South Africa, respectively.

(Signed) B. WINIARSKI,
President.

(Signed) GARNIER-COIGNET,
Registrar.

Judge SPIROPOULOS makes the following declaration:

Although the interest of the Governments of Liberia and Ethiopia that the Court should pass upon the violations by South Africa of the Mandate for South West Africa alleged by those Governments is entirely comprehensible, it is not possible for me to follow the reasoning of the Court which leads it to hold that it has jurisdiction.

Can it readily be found that the Mandate is a "treaty or convention" within the meaning of Article 37 of the Statute of the International Court of Justice; that the Mandate, as a "treaty", survived the collapse of the League of Nations (of which the formal act of "dissolution" of the League of Nations was the result); that Article 7 of the Mandate—assuming the Mandate to be in force—

can be relied on by States none of which is a "Member of the League of Nations", that organization no longer being in existence?

It appears to me that any attempt to give an affirmative answer to these questions, and they are not the only ones which arise, must necessarily be based on arguments which, from the standpoint of law, do not seem to me to have sufficient weight.

In these circumstances it is not possible for me to concur in the Court's conclusion. To be upheld, the Court's jurisdiction must be very clearly and unequivocally established, and that does not seem to me to be the case here.

Judges BUSTAMANTE Y RIVERO and JESSUP and Judge *ad hoc* Sir Louis MBANEFO append to the Judgment of the Court statements of their Separate Opinions.

President WINIARSKI and Judge BASDEVANT append to the Judgment of the Court statements of their Dissenting Opinions; Judges Sir Percy SPENDER and Sir Gerald FITZMAURICE append to the Judgment of the Court a statement of their Joint Dissenting Opinion; Judge MORELLI and Judge *ad hoc* VAN WYK append to the Judgment of the Court statements of their Dissenting Opinions.

(Initialled) B. W.

(Initialled) G.-C.