SEPARATE OPINION OF SIR LOUIS MBANEFO

I agree generally with the reasons given in the Judgment of the Court, but I feel that a great deal of the argument on the first three Preliminary Objections in the Judgment goes to the merit of the case. The Court is concerned essentially at this stage with the question of jurisdiction. The way in which the claims of the Applicants and the Preliminary Objections of the Respondent are framed make it difficult for the Court to avoid touching on the merits of the case. But that notwithstanding, I feel that emphasis should be on a line of reasoning that deals essentially with the issue of jurisdiction; and the opinion which I now give is intended to supplement the reasoning of the Court on the First, Second and Third Preliminary Objections.

These objections of the Respondent, as set out in its final submissions, are:

Firstly, that 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 said Mandate Agreement as a whole, including Article 7 thereof, and

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

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

In dealing with the issue of jurisdiction, I think it would be better to begin with the position as it was before the dissolution of the League. The first question that leaps to the mind then is would the Permanent Court of International Justice have had jurisdiction in the matter now before the Court? If it would, then by Article 37 of the Statute of the International Court of Justice that jurisdiction

would have been transferred to this Court, assuming that the Mandate with Article 7 is still in force.

The competence of the Permanent Court of International Justice is provided for in Article 36 of the Statute of that Court, the first paragraph of which reads as follows:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force."

The Permanent Court would have had jurisdiction if the Mandate which contains Article 7 on which the Applicants base their right to come to Court was a treaty or convention in force. The Respondent says in its final submission that the Mandate was never a treaty or convention and that if it ever was a treaty or convention, it is, since the dissolution of the League, no longer in force. I agree with the Court that the Mandate is and has always been a treaty or convention in force and I shall explain how I came to that conclusion later. Assuming, therefore, that the Mandate was a treaty or convention in force, when the Permanent Court of International Justice was abolished, Article 37 transferred to this Court the jurisdiction which the Permanent Court had or would have had under Article 7 of the Mandate.

Paragraph 1 of Article 35 of the Statute of this Court states that the Court shall be open to the States parties to the Statute of the International Court, and by Article 93 of the Charter of the United Nations all Members of the United Nations are *ipso facto* parties to the Statute of the Court. Paragraph 2 deals with conditions under which other States could have access to the Court, but we are not concerned with that in this case, as both Ethiopia and Liberia and the Respondent are Members of the United Nations and therefore parties to the Statute of this Court. It follows that if by reason of Article 37 this Court assume jurisdiction under Article 7 of the Mandate, the Applicants, to be able to come to this Court, must be Members of the United Nations, as indeed they are. Article 36 of the Statute of the International Court contains the same provisions as Article 36 of the Statute of the Permanent Court quoted above.

The Applicants base their right to come to Court on Article 7 of the Mandate and on Article 37 of the Statute of the International Court having regard to Article 80 (1) of the United Nations Charter.

Article 80 (1) of the United Nations Charter is not a jurisdictional clause; it is essentially an interpretation clause and as such it has no direct bearing on the issue of jurisdiction.

The first important issues which the Court is then called upon to decide on the First Preliminary Objection are whether the Mandate was a treaty or convention and, if it was, whether it is still in force

after the dissolution of the League of Nations and, if in force, whether Article 7 survived with it.

These issues are substantially raised in paragraphs 1 and 2 of the Applicants' claims as set out in their respective Applications. They are issues which the Court will have to decide in any case in order to satisfy itself that it has jurisdiction to entertain the claims and the fact that they are included as part of the claims before the Court only serves to emphasize their importance in that respect. Their inclusion as part of the claims therefore does not of itself give the Court jurisdiction to deal with the case. The Court's competence must be shown to exist independent of the claim before it.

Treaty or convention in force

In his submission, Respondent says with respect to the First Objection, that 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. The submission is advanced with respect to the Mandate Agreement as a whole, including Article 7 thereof, and, in any event, with respect to Article 7 itself.

The first part of the submission, namely, that the Mandate Agreement was never a "treaty or convention in force", was based on a review of the history of the creation of the Mandate as given on behalf of the Respondent in answer to certain questions posed by a Member of the Court, in particular questions Nos. 3 and 4 which read as follows:

> "*Question 3:* Does any party to these proceedings claim that the Declaration by the Council (Annex B) is in itself a treaty or convention?"
>
> "*Question 4:* ... *A*. Who in 1920 were the parties to any treaty or convention by virtue of which the Mandate was conferred upon the Respondent upon the terms or provisions set out in the Declaration?
>
> *B*. If States, Members of the League, were parties to such treaty or convention:
>
> (1) Was the treaty or convention registered under the provisions of Article 18 of the Covenant and the machinery for registration established by the League? If so, by whom was it registered and to whom was the certificate of registration issued?
>
> (2) If not registered, what significance, if any, is to be attached to the fact of non-registration?"

The Respondent said in its reply that the Declaration was not *in itself* a treaty or convention: because it was called a "declaration" and not a treaty or convention, was never signed by the Mandatory, had no provision for ratification, was never ratified and

was never registered. It, however, added in answer to question *A* that if the Mandate was a treaty or convention, the Parties were the Mandatory on the one hand, and the League and/or its Members as such, on the other.

Until the questions were put, the Respondent had proceeded on the basis that the Mandate Declaration was a treaty or convention. That the Mandate Declaration is a treaty or convention [within the meaning of Article 37 of the Statute of the Court] is supported strongly by the past history of the Mandate. If the Mandate Declaration was never a treaty, by what right then did the Respondent assume the administration of the territory? For upwards of 40 years it has administered the territory because it regarded the Declaration as a treaty or convention empowering it to do so on the terms therein set out. If the law of estoppel has any meaning or application in international law the Respondent would be precluded from raising such an issue on the face of its own conduct during the past 40 years. In the *Eastern Greenland* case (1933, Series A/B, p. 51) the Permanent Court of International Justice said at page 68:

> "In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland and in consequence from proceeding to occupy it."

It is significant, if there is any substance in the point, that the Respondent had not raised it earlier either in any of the previous proceedings on the various advisory opinions on the Mandate requested of the Court by the General Assembly of the United Nations, or in the proceedings of the various organs of the United Nations.

This Court in the 1950 Advisory Opinion on the Status of South West Africa held after careful consideration that the Mandate was a treaty or convention in force. In the *Mavrommatis Palestine Concessions* case (P.C.I.J. Series A, No. 2, p. 7), the Permanent Court of International Justice regarded the Palestine Mandate created in a similar manner as the Mandate for South West Africa as a treaty or convention creating rights and obligations recognized by international law, and based jurisdiction on Article 26 of that Mandate, which is identical to Article 7 of the Mandate for South West Africa.

The Court in its Judgment has given a brief history of the creation of the Mandate with which I generally agree, and I do not intend to repeat it here. It is enough to say for the purpose of my argument that Article 22 of the Covenant of the League, which was an integral part of the Peace Treaty with Germany, provides that overseas territories which Germany had by Articles 118 and 119 of the Peace

Treaty surrendered to the Principal Allied and Associated Powers should be governed on the principle that the well-being and the development of the peoples of those territories form a sacred trust of civilization and that securities for the performance of the trust should be embodied in the Covenant; that the tutelage of such peoples should be entrusted to advanced nations who are willing to undertake the responsibility, and that the tutelage should be exercised by them on behalf of the League of Nations. Article 22 further provides that the degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by Members of the League, be explicitly defined in each case by the Council of the League. The Principal Allied and Associated Powers, in whose favour Germany renounced the territories, acting in accordance with Article 22, had previous to the signing of the Treaty agreed that the Mandate for South West Africa should be conferred upon His Britannic Majesty (who at the time had authority legally to undertake international obligations on behalf of the Government of the Union of South Africa) on behalf of the Government of the Union of South Africa. The Council of the League, confirming the Mandate, defined its terms in the form as set out in the Declaration, Annex B. The terms thus defined by the Council pursuant to Article 22 (8) of the Covenant of the League and agreed to by the Mandatory (or on its behalf) became, in my view, an annex to the Covenant, which created the Mandate and is the source from which the obligations set out in the Declaration derived their validity and binding force. As a matter of fact it had been the intention if they had been drawn up soon enough to include them in the Treaty, probably as a schedule to the Covenant.

As such, there would have been no argument that they would be regarded as part of the Covenant, which is admittedly a treaty or convention. Because they were set out in a separate document which by its preamble relates it to the Covenant does not make them any the less part of the Covenant and *a fortiori* a treaty or convention.

Terminology, as the Judgment of the Court rightly points out, is not a criterion for determining whether an instrument is a treaty or convention. In the 8th edition of Oppenheim's *International Law*, page 898, paragraph 508, it is stated:

> "International compacts which take the form of written contracts are sometimes termed not only *agreements* or *treaties*, but *acts*, *conventions*, *declarations*, *protocols*, and the like. But there is no essential difference between them and their binding force upon the contracting parties is the same, whatever their name."

Regarded as part of Article 22 of the Covenant, the Mandate Declaration would not, in my view, require further ratification or

separate registration. Article 7 provides that the Mandate Declaration shall be deposited in the archives of the League of Nations, and copies thereof sent to all Powers signatories of the Treaty of Peace. The fact that copies were to be sent to all Powers signatories of the Treaty of Peace strengthens the argument that the Declaration was to be regarded as part of the Covenant which is itself part of the Treaty of Peace.

I think it is necessary to bear in mind that the Mandate Declaration was not creating a new Mandate. It was only a step in the implementation of Article 22. The terms therein defined were intended to apply to all the "C" Mandates which included Nauru, Western Samoa, South West Africa and the North Pacific Islands. Each of these Mandates contain identical terms as are set out in the Declaration under consideration. It would therefore be wrong to regard it as a mere Council resolution. The Council in defining the terms was carrying out a duty assigned to it under paragraph (8) of Article 22. Nor do I agree that Article 7 of the Mandate went beyond what the Council was authorized to do under Article 22. Article 7, read in the light of paragraph 8 of Article 22 of the Covenant, is a limitation on the power of administration which had been conferred on the Mandatory. The first paragraph of the Article says the Mandatory cannot modify the terms of the Mandate without the consent of the Council, and the second paragraph imposes on the Mandatory the obligation to accept the compulsory jurisdiction of the Court in the event of any dispute with another Member of the League regarding the interpretation and application of the Mandate.

As to the necessity for having Article 7, this has been fully dealt with in the Judgment of the Court and it would be superfluous to add to what has been said.

I agree with the decision of the Court that the first part of the submission of the Respondent that the Mandate was never a treaty or convention should be rejected. That submission departs from the very basis on which the Respondent began its objection to jurisdiction which is the second part of its submission, namely that the Mandate is *no longer* a "treaty or convention in force".

This Court, in its Advisory Opinion in the South West Africa case in 1950, held—as I have already stated—that the Mandate survived the League and is still in force. The Respondent has not quarrelled seriously with that finding of the Court. Indeed, it says in its oral submissions, through its Agent, Dr. verLoren van Themaat (page 4 of oral proceedings):

> "We state that our submissions under the First Objection concern only the Mandate *as an agreement*, our contention being that *as a treaty or convention* the Mandate is no longer in force. We state further that no submissions are advanced about the question whether the Mandate in the wider sense of being an institution survived the

League or not. The logical effect of this attitude is that, although we make no admissions in that regard, we are prepared for the purposes of our argument in these Objections to assume that the Mandate as an institution survived the League."

Later, at pages 16 and 17, Mr. de Villiers in his oral submissions on behalf of the Respondent, also states:

"... although we contend that the Mandate, seen as a treaty or convention, has lapsed, we do not offer any argument to the Court on the question, the wider question, whether the Mandate, seen as an objective institution, is still in force, and if so, to what extent... It is therefore common cause between us and the Applicants that, for purposes of the argument, at least the substantive obligations as originally set out in clauses 2-5 of the Mandate must be regarded as still being in force."

The distinction which the Respondent tries to draw between the Mandate as an agreement and the Mandate as an objective institution is in my opinion not feasible. It proceeds from a misconception of the nature of the Mandate.

The Court in its Advisory Opinion of 1950 described the Mandate in these terms:

"It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a 'mandator' in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The 'Mandate' had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeds that of contractual relations regulated by national law. The Mandate was created in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa.

The essentially international character of the functions which had been entrusted to the Union of South Africa appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports to it; it also appears from the fact that any Member of the League of Nations could, according to

Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate."

Judge Read in his separate Opinion, at page 164, also said of it:

"It is sufficient to note that the international status of South West Africa was that of a mandated territory. The Union of South Africa exercised most of the powers which are inherent in sovereignty, but the residual elements were neither exercised nor possessed by the Union. It was subject to three kinds of international obligations.

The first, and the most important, were obligations designed to secure and protect the well-being of the inhabitants. They did not enure for the benefit of the Members of the League, although each and every Member had a legal right to insist upon their discharge. The most important, the corner-stone of the Mandates System, was 'the principle that the well-being and development of such peoples forms a sacred trust of civilization', a principle which was established in paragraph 1 of Article 22 of the Covenant.

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

The third kind of obligations comprised the legal duties which were concerned with the supervision and enforcement of the first and the second. There was the compulsory jurisdiction of the Permanent Court, established by Article 7 of the Mandate Agreement; and there was the system of report, accountability, supervision and modification, under paragraphs 7, 8 and 9 of Article 22, and Articles 6 and 7 of the Mandate Agreement. This third class of obligations was the new element in the Mandates System, and its importance should not be underrated. At the same time it should not be overestimated. The disappearance of the obligations included in the first and the second classes would bring the Mandates System to an end. The disappearance of the régime of report, accountability, supervision and modification, through the Council and the Permanent Mandates Commission, might weaken the Mandates System; but it would not bring it to an end. As a matter of fact, the record shows that the paralysis of those agencies during six war years had no detrimental effect upon the maintenance of the well-being and development of the peoples."

The Mandate, it is clear from the above views, with which I agree, exists in terms of rights and obligations as set out in Article 22 of the Covenant and in the Mandate Declaration. As an institution it is a bundle of rights and obligations, not a physical edifice, although it has physical aspects in the existence of the Mandatory, the territory and its inhabitants, the League and its component Member States, bodies which have the rights and to

whom the obligations are owed. When the Court in 1950 said that the Mandate survived, it is this bundle of rights and obligations, in so far as they are still capable of being exercised and enforced, that survived. It is rather unconvincing to say, as the Respondent has said, that only clauses 2-5 of the Mandate (which creates certain rights for the Mandatory and, by his argument, no enforceable obligations) survived but that the instrument containing the clauses has ceased to have effect. If the right to administer the territory which the Respondent claims survive, it can only survive because the instrument creating it is still in force unless its continued validity can be traced to another source; and no such source has been suggested; hence the Court said in 1950 (page 133, paragraph 2):

> "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."

With respect to Article 7, the Respondent says that even if the Mandate was ever a treaty or convention in force, the Article has lapsed with the dissolution of the League as there is now no longer any Member of the League capable of enforcing it; in other words, that a condition for invoking Article 7 is a continued membership of the League. Up to a point there is some force in this argument. The right conferred by Article 7 is conferred on Members of the League; the idea of the Mandate was conceived within the framework of the League; the finalizing of the terms, the power to accept reports and to supervise the administration, and the power to agree to a modification of the terms of the Mandate, were vested in the League or its organs. The purpose of the Mandate, however, is the well-being and development of the peoples of the territories as a sacred trust of civilization. That purpose has not yet been achieved, and no one has suggested that it has been abandoned or rendered invalid with the dissolution of the League. Although the League was dissolved, the Mandate still continues and the rights and obligations embodied in it became, as it were, maintained at the level at which they were on the dissolution of the League. It is on this ground that the Respondent can justify its right to continue to administer the territory and those States who were Members of the League at the time of its dissolution the right to continue to invoke the compromissory clause of Article 7. The right to invoke Article 7 remained vested in those States who were Members of the League at the time of its dissolution, and continues notwithstanding the termination of the League's functions.

Reference has been made in the Judgment to the resolution of 18 April 1946 of the General Assembly of the League of Nations

and to the undertakings given by the Mandatories, including the Respondent, to continue to administer the territories in accordance with their respective Mandates until other arrangements were made. The point which has been made in the Judgment of the Court, and which I feel needs to be emphasized, is that the life of the Mandates system after the dissolution of the League was to be of a very short duration, because of the provision for the Trusteeship System in the Charter of the United Nations. The other Mandates have been satisfactorily terminated, but the winding-up operation has continued in the case of the Mandate for South West Africa and as long as it continues it will still be open to those States who were Members of the League at the time of its dissolution to continue to have the right to call the Mandatory to question if he acts contrary to the terms of his Mandate.

In his Submission on the Third Preliminary Objection the Respondent says that the conflict or disagreement alleged by the Applicants to exist between them and the Respondent is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa and more particularly in that no material interests of the Applicants or of their nationals are involved therein or affected thereby.

Respondent's argument proceeded on the assumption that, despite the dissolution of the League, Applicants would still be entitled to invoke the provisions of Article 7 of the Mandate for South West Africa in an appropriate case. The burden of his argument is that there is a qualification inherent in the meaning of the word "dispute" in a compulsory jurisdiction clause, such as Article 7, and that is "a confining of the subject-matter in dispute to something in which the Applicants have legal rights or interests". He says that the dispute in the instant case does not affect any material interests of the Applicant States or their nationals.

In construing the word "dispute" in Article 7, one should first look at the word in the light of its ordinary and natural meaning. The material part of Article 7, for the purpose of this Preliminary Objection, reads as follows:

> "The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another Member of the League relating to the interpretation or the application of the provisions of the Mandate..."

It is not contended that the dispute, whatever it is, does not relate to the interpretation or the application of the provisions of the Mandate. Respondent's Counsel concedes that it does. Indeed, he says in his oral submission:

> "Our contention is not concerned with the question whether the subject-matter of the dispute falls within the category interpre-

tation or application of the Mandate. We assume for the purposes of argument that it does so fall."

Unless the context otherwise dictates, or there is some express provision to the contrary, the term "dispute" must be given its ordinary and natural meaning. In the context in which the word appears in Article 7, no such inherent qualification as Respondent's Counsel contends can legitimately be implied or read into it. In its Advisory Opinion on *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania* in 1950, this Court held, at page 74, that "where there has arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations, the Court must conclude that international disputes have arisen"; and in its Judgment in the *Asylum* case between Colombia and Peru, November 1950, the Court said that "a dispute requires a divergence of views between the parties on definite points". In the *Mavrommatis* case the Permanent Court of International Justice, in dealing with Article 26 of the Mandate for Palestine, which is an identical clause to Article 7 of the Mandate for South West Africa, defines "dispute" as a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".

Respondent's Counsel found himself in some difficulty when he came to define "interest". He said that it must be material interest. The Court cannot decide whether a dispute affects the material interest of an applicant without going into the evidence. An applicant is not limited to showing that its interest, be it material or not, has been affected; it is also entitled to show that the course of action pursued or threatened is likely to affect its interest or those of its nationals adversely.

But an applicant does not have to do that under Article 7 once it is shown that the parties hold clearly opposing views on a question of law of fact. In this respect the view of the Agent for the British Government in the *Mavrommatis* case is noteworthy. In the preliminary counter-case in the *Mavrommatis* case (Series C, No. 5-I, page 445) he states:

> "The concessions granted to Mr. Rutenberg in September 1921 for the development of electrical energy and water-power in Palestine were obliged to conform to this Article 11, and it would have been open to any Member of the League to question provisions in those concessions which infringed the international obligations which His Britannic Majesty as Mandatory for Palestine had accepted."

Article 7 speaks of "any dispute whatever". That phrase throws the net as wide as possible. The framers of the Article could not

be thinking only of disputes where the right or material interest of a State or its nationals was concerned. The inhabitants of the mandated territory of South West Africa could not themselves—either individually or collectively—under the Court's Statute or Rules bring an action to the Permanent Court, nor could the League, so that when the Mandate speaks of "any dispute whatever between the Mandatory and another Member of the League", *vis-à-vis* the Mandate, the authors of the Mandate Agreement must have intended that *any* breach of its obligations by the Mandatory, if it could not be settled by negotiation, should be the subject-matter of an action in a contentious proceeding under the compulsory jurisdiction of the Court. In the *Mavrommatis* case the Permanent Court said, at page 15: "The dispute may be of any nature; the language of the article in this respect is as comprehensive as possible."

I do not therefore find any substance in the submission of Respondent that the word "dispute" should be given a restricted meaning by confining it to disputes in which the material interests of the Applicants are involved. Further, I am of the view that, even if any such interest is required to sustain an action under Article 7, absence of such interest may be a ground for refusing a claim but not for denying jurisdiction and, in any event, the Applicants as has been shown in the Judgment of the Court have such interest in ensuring that the Mandatory carry out its international obligations under the Mandate.

I agree with the Judgment of the Court that the Mandate is a treaty or convention in force and that Article 7 of the Mandate Declaration is still in force. I also agree with the conclusion reached by the Court that the Third and Fourth Preliminary Objections are not well founded. It follows therefore that Applicants as parties to the Statute of this Court have the right by virtue of Articles 36 and 37 of the Statute of the Court to invoke the compulsory jurisdiction of the Court in the instant proceedings.

(Signed) Louis MBANEFO.