DISSENTING OPINION OF JUDGE BASDEVANT

[Translation]

I regret that I am unable to subscribe to the Judgment by which the Court upholds its jurisdiction in the case against the Republic of South Africa which Ethiopia and Liberia have referred to it. In particular I am unable to subscribe to the grounds which the Court has stated in support of that Judgment.

In their Applications instituting proceedings, Ethiopia and Liberia stated, "having regard to Article 80, paragraph 1, of the United Nations Charter", that they found "the jurisdiction of the Court on Article 7 of the Mandate for German South West Africa made at Geneva on December 17, 1920, and on Article 37 of the Statute of the International Court of Justice". To these Applications and to the ensuing Memorials of these two States, the Republic of South Africa raised Preliminary Objections, and it put forward various grounds on which it disputed the jurisdiction of the Court. The Court thus had before it "a dispute as to whether the Court has jurisdiction", in the event of which, Article 36, paragraph 6, of the Statute provides that "the matter shall be settled by the decision of the Court".

In order to settle this dispute, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it", should have considered the invitation to the Applicants in Article 32, paragraph 2, of the Rules of Court to indicate the provisions on which they founded the jurisdiction of the Court. They have done so. This being so, the Court had in the first place to consider what had thus been indicated by the Applicants. Without dwelling upon the silence preserved in the reasoning of the Judgment with regard to the Applicants' reference to Article 80, paragraph 1, of the Charter, which appears only incidentally as part of a quotation from the statement of the Belgian delegate during the discussion of the resolution of 18 April 1946, I would observe that the method adopted by the Court consists on the contrary of taking as a point of departure considerations advanced by the Respondent in support of its denial of jurisdiction.

The "dispute as to whether the Court has jurisdiction" in the present case, a matter which is to be settled by the decision of the Court in the present Judgment, found its precise expression in the submissions presented by the Parties. In its final submissions, the Government of South Africa, for various reasons set forth by it in its pleadings and oral arguments, submitted that the Court "has no jurisdiction to hear or adjudicate upon the questions ... raised

in the Applications and Memorials" of the Applicants. The Governments of Ethiopia and Liberia, for their part, in their final submissions, asked that it might "please the Court to dismiss the Preliminary Objections ... and to adjudge and declare that the Court has jurisdiction to hear and adjudicate the questions ... raised in the Applications and Memorials".

In order to decide whether it has jurisdiction in the present case, the Court must apply its Statute, Chapter II, which is entitled "Competence of the Court", in particular Articles 36 and 37. Article 36, in its first paragraph, lays down the principle; there follow, in that Article and in Article 37, certain particular and complementary provisions. On the basis of what is laid down by the Statute, the Court need only consider Article 7 of the Mandate, which has been invoked by the Applicants, if the Statute itself leads to effect being given to Article 7. This is so in the present case but, for the moment, I am concerned to point out that the proper procedure, in the face of the assertion of the Applicants that they invoke Article 7 of the Mandate and Article 37 of the Statute, would have been to consider them in the opposite order.

The Court however directed its attention in the first place to the Mandate and to Article 7 thereof. It was led to do this by the form in which the Respondent presented its Preliminary Objections.

The examination of the First Objection led the Court to state its views as to the legal character of the "Mandate for German South West Africa made at Geneva on December 17, 1920", the Mandate being thus designated in accordance with the wording of the Applications. The Court, on the basis of its findings, has stated that that Mandate was in itself a treaty: it was on that basis that the Court examined the other questions in issue before it at the present stage of the proceedings, and it is on that basis that it has reached its decision as to its jurisdiction to hear and determine the dispute referred to it.

The Court has done this without reference to the fact that according to the Applications, paragraph 1, "the subject of the dispute is the continued existence of the Mandate for South West Africa". The Court has done so without explaining whether, in adjudicating upon the issue of jurisdiction, it intended or did not intend to prejudge the merits.

I regret that I am unable to accept that the Mandate made by an act of the Council of the League of Nations of 17 December 1920, an act performed by the Council in the exercise of powers conferred upon it by Article 22, paragraph 8, of the Covenant of the League of Nations, was anything other than an instrument issuing from the Council, that it was a treaty of which I am unable to see which were the contracting States. I can indeed see that, prior to the instrument instituting the Mandate, several agreements were

reached, declarations of intention were made and are referred to, in particular the acceptance by the Mandatory of the jurisdiction of the Permanent Court to hear and determine certain disputes, all these things were important in their own way, but reference thereto by the Council of the League of Nations in the instrument instituting the Mandate, an instrument issuing from the Council, cannot affect the character of that instrument itself. It is an instrument issuing from an international authority, an act done in virtue of powers conferred upon that international authority by Article 22 of the Covenant, one which lays down the legal rules binding as between States Members of the League of Nations; that decision taken on 17 December 1920 by the Council of the League of Nations might, at the appropriate time, have been regarded as among the "existing international instruments to which Members of the United Nations may respectively be parties", instruments to which reference is made in Article 80, paragraph 1, of the Charter; exploration of that course might have been attempted; this is not the time to do it. I am quite unable to accept that characterization according to which the Mandate instrument issuing from the Council of the League of Nations was, on 17 December 1920, a treaty.

Since I do not recognize the Mandate instrument as having the character of a treaty, it is unnecessary for me to follow the Court in its examination of the requirement laid down by Article 18 of the Covenant of the League of Nations concerning the registration of treaties and of what was done in this connection. Still less is it necessary for me, as going beyond such concerns, to consider the differences between Article 18 of the Covenant and Article 102 of the Charter.

The statement that the Mandate is a treaty is a very important point in the reasoning of the Judgment. It leads easily to a finding of the substitution of the International Court of Justice for the Permanent Court, to the attribution to the International Court, by the operation of Article 37 of the Statute, of certain powers conferred entirely on the Permanent Court. This leads to a replacement of the reference in Article 7 of the Mandate to "another Member of the League of Nations" by a reference to Members of the United Nations; moreover this is effected not directly but by means of interpretation. This, however, is subject to a reservation with regard to any increase of supervision over the Mandatory which may be involved by that replacement.

I recognize that to regard the Mandate as a treaty simplifies the task before the Court. If the Mandate is something other than a treaty, if it is an act of the Council of the League of Nations, legally binding on all its Members, the question would still arise whether Article 37 of the Statute of the Court is applicable to it, on the ground that the expression "treaty or convention in force" is to be taken in Article 37 in a broad sense extending to "existing international instruments to which Members of the United Nations

may respectively be parties" in the wording adopted in Article 80 of the Charter.

As I have said, the Court has felt able to rely on what it recognizes as the treaty character of the Mandate established by the decision of the Council of the League of Nations of 17 December 1920. I do not subscribe to this interpretation. I adhere to the character of the instrument made by the Council of the League of Nations on 17 December 1920 and thus to what existed during the lifetime of the League of Nations and the Permanent Court of International Justice. I have not found anything to indicate that at that time the particular character of the Council's instrument was disputed.

I therefore confine myself to the provisions of the Mandate and hence to the contents of Article 7.

Article 7 of the Mandate containing the jurisdictional clause, which the Applicants rely on, deriving the substitution of the International Court for the Permanent Court from Article 37 of the Statute, cannot be used to found the jurisdiction of the new Court unless certain explanations to this effect are now given. These explanations are not to be found in the Judgment because it has understood the Mandate as constituting a treaty in itself as of 1920 and hence during the lifetime of the League of Nations. The explanations which I would have hoped to find in the Judgment may be sought in a number of directions.

First of all, one explanation would be to point to the imprecision of the terminology in the use of the expression "treaty or convention in force". In a particular case two States may be agreed upon the use of that expression in this sense. It could be maintained that such is the meaning of that expression in Article 37 of the Statute of the International Court of Justice.

Moreover, if the International Court's title to jurisdiction is sought through the application of Article 37 of the Statute to Article 7 of the Mandate, Article 36 should not be left aside in its entirety. That Article makes careful provision for the ability of States to declare that they recognize as compulsory the jurisdiction of the Court; is not the acceptance of jurisdiction stated by the Mandatory in Article 7 of the Mandate similar, and is that similarity not strengthened by the similarity of origin, in 1920, of these two provisions? But what is then to be concluded from this? Is it that Article 36, paragraph 5, of the Statute is applicable to Article 7; is it on the contrary that nothing occurred to transfer to the International Court jurisdiction rendered inapplicable by the disappearance of the Permanent Court? These are all questions which in my view should have been dealt with in the Judgment.

Whatever course might be followed with a view to reaching a decision on the jurisdiction or lack of jurisdiction of the Court in the present case, I would have wished the Court to give greater attention than it has done to an examination of the third objection.

The Court might even have been able to do this without going into the legal nature of the Mandate.

In examining the third objection, it would have been desirable to recall that Judgment No. 2 of the Permanent Court of International Justice (*Mavrommatis* case) held that a State, on the basis of the jurisdictional clause of a Mandate, had capacity to exercise judicial protection of its nationals before that Court.

It is something else which is involved in the present case. Here the Applicant States rely on their membership of the United Nations; their participation in United Nations supervision over the Mandatory and their interest in the sacred trust of civilization which is the basis of the Mandate institution; and finally, their right to protect the interests of the populations of the territory against breaches of its obligations by the Mandatory.

In another case the Court emphasized and set its seal upon the right of the United Nations to exercise functional protection of its agents as against a State, by diplomatic means. Should the Court recognize that a Member of the United Nations has a right to exercise judicial protection for the benefit of the peoples of the mandated territory?

This is certainly a new question. Since the Mandate was conferred on South Africa, and thus for almost forty years, no such claim has been made before the Applications of the present two States. In addition, considerations of high moral value have been adduced in favour of such judicial protection. However, such considerations cannot disguise the fact that if they are at the root of the Mandate, the best way of satisfying them was sought in the selection of the Mandatory and in supervision over the Mandatory in accordance with the provisions of the Mandate on the basis of Article 22 of the Covenant of the League of Nations.

Is the Court right to recognize that Applicant States Members of the United Nations are qualified to exercise such judicial protection, which they seek to do by relying on their participation in the exercise of supervision by the General Assembly, an organ of the United Nations of which they are Members? Is there anything to be gleaned on this point from municipal legal systems or international law? Must it be found that the availability of judicial protection is necessary for the effectiveness of the supervision to which it was the intention of the Mandate that the Mandatory should be subject? Did the Mandatory, by stating in Article 7 of the Mandate that it agreed that if any dispute should arise between it and another Member of the League of Nations, it should be submitted to the Court, thereby accept such a novel application of judicial supervision? Is such an interpretation of Article 7 consistent with the characteristic of compulsory jurisdiction which is so often referred to, namely that it is based on State consent? Is it possible to embark on such a course, since subsequent to the replacement of League of Nations by United Nations organs the number of States

entitled to have recourse to this form of judicial protection substantially increased, while no special agreement for this purpose to which the Mandatory was a party can be advanced.

All these points have not been given sufficient attention by the Court. Moreover, if their examination were to make for acceptance of such judicial protection on behalf of the peoples of the mandated territory, then, having regard to the great number and diversity of the points on which the Applicants call the Mandatory's conduct in question, the very novel problem of jurisdiction thus raised could not be examined except by reference to each of those points. It is possible that the third objection could be upheld or overruled and hence a decision taken on the jurisdiction of the Court only after discussion of the merits of the dispute referred to the Court.

The third objection does not seem to me to have been given adequate study; it is naturally not for me to enter further into the details of the study which should have been made of it.

The foregoing considerations prevent me from concurring in the operative part of the Court's Judgment.

(Signed) BASDEVANT.