I.C.J.

Communiqué No. 62/32
(Unofficial)

The following information from the Registry of the International Court of Justice is communicated to the Press:

The International Court of Justice today (21 December 1962) delivered its Judgment in the South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) (Preliminary Objections).

The case, which relates to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory thereunder, was instituted by Applications of the Governments of Ethiopia and Liberia filed in the Registry on 4 November 1960. The Government of South Africa raised preliminary objections to the jurisdiction of the Court to hear the case.

By eight votes to seven the Court found that it had jurisdiction to adjudicate upon the merits of the dispute.

Judges Bustamante y Rivero and Jessup and Judge ad hoc Sir Louis Mbanefo appended Separate Opinions.

President Winiarski and Judge Basdevant appended Dissenting Opinions; Judges Sir Percy Spender and Sir Gerald Fitzmaurice appended a Joint Dissenting Opinion; Judge Morelli and Judge ad hoc van Wyk appended Dissenting Opinions.

Judge Spiropoulos appended a Declaration of his dissent.

x

x x

In its Judgment, the Court noted that to found the jurisdiction of the Court, 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.

Before undertaking an examination of the Preliminary Objections raised by South Africa, the Court found it necessary to decide a preliminary question relating to the existence of the dispute which is the subject of the Applications. On this point it found that it was not sufficient for one party to a contentious case to assert that a dispute existed with the other party. It must be shown that the claim of one party was positively opposed by the other. Tested by this criterion, there could be no doubt about the existence of a dispute between the parties before the Court, since it was clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.

x

x x

The ....

The Court then briefly recalled the origin, nature and characteristics of the Mandates System established by the Covenant of the League of Nations. The essential principles of this system consisted 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 Members. The rights of the Mandatory in relation to the mandated territory and the inhabitants had their foundation in the obligations of the Mandatory and were, so to speak, mere tools given to enable it to fulfil its obligations.

The first of the Respondent's preliminary objections maintained that the Mandate for South West Africa had never been, or at any rate was 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. In presenting this preliminary objection in this form, the Respondent stated that it 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" 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 Respondent added "this view ... would regard the Council's Declaration as setting forth a resolution ... 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 view was not well-founded. While the Mandate for South West Africa took the form of a resolution, it was obviously of a different character. It could not be regarded as embodying only an executive action in pursuance of the Covenant. In fact and in law it was an international agreement having the character of a treaty or convention.

It had been argued that the Mandate in question had not been 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 had been ab initio null and void on the ground of non-registration, it would follow that the Respondent had not and had 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 had had such a title up to the discovery of this ground of nullity. 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 was one of the parties as in respect of treaties concluded among individual Member States.

Since the Mandate in question had had the character of a treaty or convention at its start, the next relevant question to be considered was whether, as such, it was still in force either as a whole including Article 7, or with respect to Article 7 itself. The Respondent contended that it was not in force, and this contention constituted the essence of the first preliminary objection. It was argued that the

rights and obligations under the Mandate in relation to the administration of the territory being of an objective character still existed, 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, had necessarily become extinct on the dissolution of the League of Nations. The Respondent further argued that the casualties arising from the demise of the League of Nations included Article 7 of the Mandate by which the Respondent had 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 Mandate.

On this point the Court, recalling the Advisory Opinion which it had given in 1950 concerning the International Status of South West Africa, stated that its findings on the obligation of the Union Government to submit to international supervision were crystal clear. To exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate. The Court also recalled that while it had been divided in 1950 on other points, it had been 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 the Court was still "in force". Nothing had since occurred which would warrant the Court reconsidering its conclusions. All important facts had been stated or referred to in the proceedings in 1950.

The Court found that though the League of Nations and the Permanent Court of International Justice had both ceased to exist, the obligation of the Respondent to submit to compulsory jurisdiction had been effectively transferred to the present Court before the dissolution of the League of Nations. The League had ceased to exist from April 1946; the Charter of the United Nations had entered into force in October 1945; the three parties to the present proceedings had deposited their ratifications in November 1945 and had become Members of the United Nations from the dates of those ratifications. They had since been subjected to the obligations, and entitled to the rights, under the Charter. By the effect of the provisions of Articles 92 and 93 of the Charter and Article 37 of the Statute of the Court, the Respondent had bound itself, by ratifying the Charter at a time 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 the present Court in lieu of that of the Permanent Court.

This transferred obligation had been voluntarily assumed by the Respondent when joining the United Nations. The validity of Article 7, in the Court's view, had not been affected by the dissolution of the League, just as the Mandate as a whole was still in force for the reasons stated above.

The second preliminary objection centred on the term "another Member of the League of Nations" in Article 7, the second paragraph of which 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 ... shall be submitted to the Permanent Court of International Justice ..."

It ....

It was contended that since all Members States of the League 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, no State had "locus standi" or was qualified to invoke the jurisdiction of the Court in any dispute with the Respondent as Mandatory.

The Court pointed out that interpretation according to the natural and ordinary meaning of the words employed was not an absolute rule, and that no reliance could be placed on it where it resulted in a meaning incompatible with the spirit, purpose and context of the provision to be interpreted.

Judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. 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 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.

Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory. If the Mandatory continued to turn a deaf ear to the Council's admonitions, 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 Mandate. But neither the Council nor the League was entitled to appear before the Court: the only effective recourse would be for a Member or Members of the League to invoke Article 7 and bring the dispute as one between them and the Mandatory to the Permanent Court for adjudication. It was for this all-important purpose that the provision had been couched in broad terms. It was thus seen what an essential part Article 7 had been 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 Mandate, 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 had been 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.

The third reason for concluding that Article 7, with particular reference to the term "another Member of the League of Nations", continued to be applicable, was that obviously an agreement had been reached among all the Members of the League of Nations at the session in April 1946 to continue the different Mandates as far as it was practically feasible 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 was evidenced not only by the contents of the League 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. Those States which had been Members of the League at the time of its

dissolution ....

dissolution continued to have the right to invoke the compulsory jurisdiction of the Court as before the dissolution of the League, and that right continued to exist for as long as the Respondent held on to the right to administer the territory under the Mandate.

During the prolonged discussions which had been held both in the Assembly and in its First Committee the delegates of the Mandatory Powers present solemnly expressed their intention to continue to administer the territories entrusted to them in accordance with the general principles of the existing Mandates. In particular the delegate of South Africa, on 9 April 1946, stated "... the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate ... . The disappearance of those organs of the League concerned with the supervision of mandates ... 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 ...". There could have been 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 clear from the foregoing that there had been 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. Manifestly, this continuance of obligations under the Mandate could not have begun to operate until the day after the dissolution of the League of Nations; hence the literal objections derived from the words "another Member of the League of Nations" were not meaningful, since the resolution of 18 April 1946 had been 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 the term "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.

To deny the existence of the agreement it had been said that Article 7 was not an essential provision of the Mandate instrument for the protection of the sacred trust of civilisation. No comparable clause had been inserted in the Trusteeship Agreements for the territories previously held under three of the four "C" Mandates.

For the reasons stated above, the Court dismissed the first and second objections.

The third objection consisted essentially of the proposition that the dispute brought before the Court was not a dispute as envisaged in Article 7 of the Mandate. The Court recalled that Article 7 referred to "any dispute whatever" arising between the Mandatory and another Member of the League of Nations. The language used was broad, clear and precise and referred to any dispute whatever relating to all or any of the provisions of the Mandate, whether they related to substantive obligations of the Mandatory toward the inhabitants of the territory or toward the other Members of the League, or to its

obligations to submit to supervision by the League or to protection under Article 7. The scope and purport of these provisions indicated 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 and toward the League of Nations and its Members. While Article 6 of the Mandate provided for administrative supervision by the League, Article 7 in effect provided, with the express agreement of the Mandatory, for judicial protection by the Permanent Court. Protection of the material interests of the Members was of course included within its compass, but the well-being and development of the inhabitants were not less important.

The Court concluded that the present dispute was a dispute as envisaged in Article 7 of the Mandate and that the third preliminary objection must be dismissed.

The Court next considered the fourth and last objection, which in essence consisted of the proposition that if a dispute existed within the meaning of Article 7, it was not one which could not be settled by negotiation with the Applicants and that there had been no such negotiations with a view to its settlement.

In the Court's view, the fact that a deadlock had been reached in the collective negotiations in the past, and the fact that both the written pleadings and oral arguments of the Parties had clearly confirmed the continuance of this deadlock, compelled a conclusion that no reasonable probability existed that further negotiations would lead to a settlement. The Respondent having contended that no direct negotiations between it and the Applicants had ever been undertaken, the Court found that what mattered was not so much the form of negotiation as the attitude and views of the Parties on the substantive issues of the question involved.

Moreover, where the disputed questions were of common interest to a group of States on one side or the other in an organised body, parliamentary or conference diplomacy had often been found to be the most practical form of negotiation.

For the reasons stated, the fourth objection was not well-founded and should also be dismissed.

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

The Hague, 21 December 1962.