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SOUTH WEST AFRICA CASES

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

(PRELIMINARY OBJECTIONS.)

International Court of Justice. Judgment of December 21, 1962.

(Winiarski, *President*; Alfaro, *Vice-President*; Basdevant, Badawi, Moreno Quintana, Wellington Koo, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Koretsky, Bustamante y. Rivero, Jessup, Morelli, *Judges*; Sir Louis Mbanefo, van Wyk, *Judges ad hoc.*)

THE FACTS (as stated by the Court).—[321] “On November 4, 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 October 28, 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 November 4, 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 December 17, 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 January 13, 1961. By letters dated March 28, 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 April 15, 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 May 20, 1961, joined the proceedings in the two cases, and fixed the time-limit as requested.

“ On November 30, 1961, within the time-limit fixed for the presentation of its first pleading, the Government of South Africa filed [322] Preliminary Objections. Accordingly, an Order of December 5, 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 March 1, 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 March 1, 1962, in respect of the Preliminary Objections.

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“ Pursuant to Article 31, paragraph 3, of the Statute, and the Order of the Court of May 20, 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 October 2-5, 8-11, 15-17, and 19 and 22, 1962, hearings were held . . .

“ 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 [323] 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 [324] 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 ';

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“ 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 [325] 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 [326] 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 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.'

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

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“ *On behalf of the Government of South Africa,*
at the hearing on October 11, 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-[327]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 October 17, 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 October 22, 1962. The Agent of the Republic of South Africa amended the Submissions which he had read at the hearing on October 11 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.'

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

Held (by eight votes to seven): that the Court had jurisdiction to adjudicate upon the merits of the dispute.

The Court said:

[328] " 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 December 17, 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^[1]) 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

[¹ *Annual Digest*, 2 (1923-1924), p. 398.]