indicates that they were given virtually no information on the subject until a very later stage."[48]

And

"In the Council, which the mandatory was entitled to attend as a member for the purposes of any mandate entrusted to it, if not otherwise a member– (Article 4, paragraph 5, of the Covenant), the vote of the mandatory, if present at the meeting, was necessary for any actual "decision" of the Council, since unanimity of those attending was the basic voting rule on matters of substance in the main League organs—(Article 5, paragraph 1, of the Covenant). Thus there could never be any formal clash between the mandatory and the Council as such. In practice, the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give and take and by various devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory "vetoed" what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decision to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions."[49]

Separate opinion

JUDGE VAN WYK

"..... in terms of paragraph 8 of Article 22, the Council was authorised to define the degree of authority,

48 *South West Africa (second phase) Judgment, 1966,* at pp. 26-27.

49 *Ibid.*, at pp. 44-45.

control or administration to be exercised by the mandatory. But this power is not relevant to the present discussion, since it was obviously intended to be exercised only once, i.e., for the purposes of framing the mandate instruments. This is so, appears not only from the provisions of paragraph 8, which made the Council's function in this respect dependent on whether or not such degree of authority, etc., had not previously been agreed upon by the members of the League, but also from the mandate declarations themselves which in effect provided that the mandates would not be amended without the consent of the mandatory and the Council. Paragraph 9 of Article 22 provided for the creation of a "permanent Commission" which was to advise the Council on all matters relating to the "observance" of the mandates. If it was intended that the Council would have legislative powers in respect of the mandates, the function of this expert commission would not have been confined to advising on the "observance" of the mandates, but would also have related to the enactment and amendment of standards from time to time."[50]

Dissenting opinions

JUDGE WELLINGTON KOO

". . . . . While paragraphs 7 and 9 of Article 22 of this instrument provide respectively for the rendering to the Council of the League an annual report by the mandatory "in reference to the territory committed to its charge", and for the constitution of a permanent commission "to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the Mandates", not all securities were spelled out in the same instrument. On the contrary by paragraph 8 "the degree of authority, control

50 *South West Africa (second phase) Judgment, 1966,* at p. 161.

or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be expressly defined in each case by the Council." Thus, for example, Article 6 of the Mandate for South West Africa provides for the making of annual reports by the Mandatory "to the satisfaction of the Council", and Article 7 of the same Mandate provides in the first paragraph that "the consent of the Council of the League of Nations is required for any modification of the terms of the present mandate" . . . . . ."[51]

And

The second cardinal principle of the mandates system is international accountability for the performance of the sacred trust. It is broadly sanctioned by paragraphs 7, 8 and 9 of Article 22 of the Covenant and more concretely by the provisions of Articles 6 and 7 of the mandate agreement. By virtue of the said Article 6 requiring the Mandatory to "make to the Council of the League of Nations an annual report to the satisfaction of the Council" on its administration of the mandated territory and similar provisions in the other Mandates, this body, by its resolution of 31 January 1923 also adopted a set of rules calling upon the Mandatories to transmit petitions from the inhabitants of each mandated territory to the Permanent Mandates Commission. In short, international accountability necessarily comprises the essential obligations of submission to international supervision and control of the mandatory's administration of the mandated territory and acceptance of the compulsory jurisdiction of the Permanent Court in any dispute between it and another Member of the League of Nations relating to the interpretation or application of the provisions of a given mandate."[52]

51 *South West Africa (second phase) Judgment, 1966*, at p. 218.

52 *Ibid.*, at p. 235.

JUDGE JESSUP

"Neither Article 22 of the Covenant nor the text of the Mandate refers to any role for the Assembly of the League of Nations. The evolution of Assembly activity under Article 3(3) of the Covenant was not then foreseen, but Article 3 of the Covenant is co-equal with Article 22 in the allocation of functions between organs of the League. The Assembly became the central organ of the League" (Walters, *Op. cit* Vol. 1, p. 127), and from the First Session insisted annually on reviewing the operation of the Mandates system."[53]

JUDGE PADILLA NERVO

"The Council of the League defined the degree of authority, control or administration to be exercised by the Mandatory for South West Africa, in the terms that the Principal Allied and Associated Powers did propose that the Mandate should be formulated."[54]

Comments

Judge Wellington Koo regarded international accountability for the performance of the sacred trust, and embodied in paragraphs 7, 8 and 9 of Article 22 of the Covenant and Articles 6 and 7 of the Mandate for South West Africa, as one of the cardinal principles of the mandates system. (See Annexures I and II to this Study). The Court, in its 1962 Judgment, pointed out that the right and duty in respect of administrative supervision of 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.

Judge Wellington Koo also pointed out that Article 22(7) of the League Covenant and Article 6 of the Mandate

53 *South West Africa (second phase) Judgment, 1966*. at p. 403.

54 *Ibid.*, at p. 453.

for South West Africa required the Mandatory to make to the League Council "an annual report to the satisfaction of the Council" on administration of the mandated territory. He and Judge van Wyk also pointed out that Article 22(9) of the Covenant provided for the creation of the Permanent Mandates Commission "to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the Mandates." Judge van Wyk, however, pointed out that the Commission's functions did not include "the enactment and amendment of standards" binding upon the Mandatory. Further, Judge Wellington Koo pointed out that the League Council, by its resolution of 31 January 1923, also adopted a set of rules calling upon the Mandatories to transmit petitions from the inhabitants of each mandated territory to the Commission.

The Court, in its 1966 Judgment, as also Judge van Wyk, Judge Wellington Koo and Judge Padilla Nervo, referred to the Council's power to define the degree of authority, control or administration to be exercised by the Mandatory in each case where the same has not been "previously agreed upon by the Members of the League". The Court pointed out that in case of the South West Africa Mandate, these matters were defined by the Council in its resolution of 17 December 1920, inasmuch as the same had not been "previously agreed upon by the Members of the League", which term the Court found on the basis of some evidence, meant only the five Principal Allied and Associated Powers. Thus, according to the Court, only these five Powers and not all the members of the League, were generally concerned with the setting up of the mandates, and information to the League members was given only at a very late stage. Judge Padilla Nervo was also of the view that in defining the degree of authority, control and administration to be exercised by the Mandatory for South West Africa, the League Council merely accepted the terms proposed by the Principal Allied and Associated Powers.

Judge Wellington Koo also referred to Article 7(1) of the Mandate which provided that "the consent of the Council of the League of Nations is required for any modification of the terms of the present mandate." However, Judge van Wyk was of the view that the consent of both the Council and the Mandatory, and not the Council alone, was necessary for any such modification. It may be noted in this connection that the provisions of Article 7(1) of the Mandate refers only to the consent of the League Council, and not to that of both the Council and the Mandatory.

With reference to the proceedings in the League Council concerning the mandates, the Court, in its 1966 Judgment, expressed the view that the Mandatory's concurrence "was necessary for any actual 'decision' of the Council", under the provisions of Article 5(1) of the Covenant which required unanimous vote of all those attending . . . . . the Mandatory, if not otherwise a member, being entitled to attend for the purposes of the mandate under its administration, under the provisions of Article 4(5) of the Covenant. In actual practice in no case a Mandatory exercised its veto, inasmuch as "the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give and take, and by various devices to which both the Council and the mandatories lent themselves", which included the "occasional deliberate absence of the mandatory from a meeting."

Judge Jessup dealt with the role of the Assembly of the League of Nations in respect of the affairs of the mandates. He pointed out that, even though neither Article 22 of the League Covenant, nor the Mandate agreement referred to any role for the Assembly, with the evolution of its activities it became "the Central organ of the League". . . . . and from the First Session insisted annually on reviewing the operation of the mandates system."

The Court in its 1966 Judgment, as well as Judge Wellington Koo, in his dissenting opinion to the 1966 Judgment,

referred to the judicial control and supervision of the performance of the trust under the provisions of Article 7(2) of the Mandate, which provided for the compulsory jurisdiction of the Permanent Court in disputes between the Mandatory and another League Member relating to interpretation or application of the provisions of the Mandate. This matter has been dealt with in details below under the sub-heading No. (v) entitled "Judicial control", in the present item.

(iv) Role of Permanent Mandates Commission

1966 Judgment

Separate opinion

JUDGE VAN WYK

". . . . . The truth is that the Mandates Commission had no legislative powers. Indeed it possessed no independent powers at all. Its function was limited to advising the Council. It is true that an interpretation of the mandate by the Permanent Mandates Commission which was accepted by the Council became a precedent to which a prudent mandatory would have due regard; but this is something quite different from saying that such a precedent became binding law which had to be applied by each and every mandatory, irrespective of its particular circumstances.

The nature of the twofold task of the Commission was contrasted by Quincy Wright as follows :

"In supervising the mandates, the Commission has felt obliged to limit its criticism by law. It does not censure the mandatory unless the latter's orders or their application are in definite conflict with the mandate or other authoritative text, but if such a conflict is reported by the Commission and the report is adopted by the Council, the mandatory is bound to recognize it. It

became an authoritative interpretation of the latter's obligations. . . . ."[55]

And

"In any event, although the Mandates Commission on one occasion, and individual members thereof on a few occasions, appeared to have been critical of certain aspects of some of the Respondent's policies of differentiation, the over-all impression gained from a detailed study of the Mandatory's and the Commission's reports is not only that the general principles of the Respondent's policies were not objected to by the Commission, but that in basic and important respects they were actually approved of . . . "[56]

Dissenting opinion

JUDGE JESSUP

" . . . The debates in the Council continued and at the meeting of 26 November, it was agreed that there should be nine members with a majority from non-Mandatory States . . .

"The actual procedures later to be followed by the Permanent Mandates Commisson were certainly not known when South Africa accepted the Mandate. The questionnaire which was regularly sent to each Mandatory was not elaborated until 1922. The Council of the League did not approve the procedures for examining petitions until January 1925 . . . ."[57]

And

"Paragraph 9 of Article 22 of the Covenant hardly gave any indication of the way in which the Permanent

55 *South West Africa (second phase) Judgment, 1966*, at p. 163.

56 *Ibid* at p. 164.

57 *Ibid.*, at p. 401.

Mandates Commission would function; it merely said that it would receive and examine the annual reports of the Mandatories" and would "advise the Council". There was no hint here of the practice established under which representatives of the Mandatories appeared regularly before the Commission at Geneva and were often subjected to severe cross-examination although in general during the days of the League of Nations the amenities of diplomatic interchange were much more rigorously observed than they have come to be in the United Nations. Harsh and violent language was rare at Geneva, 'resolutions were couched with extreme diplomatic indirection and the general tendency was to avoid putting a Member on the spot" . . .

"It was true that the Members of the Permanent Mandates Commission were selected as individual experts but this did not prevent some of the members from serving as their countries' delegates to the Assembly of the League where as national representatives they took an active part in political discussion concerning events in the mandated territories."[58]

And

"Nor would it be correct to assume that the Mandate for South West Africa was not discussed in the Permanent Mandates Commission except when a representative of the Mandatory was present . . . Even when representatives of South Africa attended a session of the Permanent Mandates Commission, it was the regular practice of the Commission to discuss the problems of the Mandate privately, either before the representative of the Mandatory was called in or after he had left or both."[59]

58 *South West Africa (second phase) Judgment 1966*, at p. 402.

59 *Ibid.*, at p. 405.

Comments

Regarding the membership of the Permanent Mandates Commission, Judge Jessup points out that the League Council, at its meeting of 26 November 1920, agreed to have nine members at the Commission with a majority from non-Mandatory States, and that the members were selected as individual experts. However, "this did not prevent some of the members from serving as their countries' delegates to the Assembly of the League where as national representatives they took an active part in political discussions concerning events in the mandated territories." He also pointed out that, according to paragraph 9 of Article 22 of the Covenant, the Commission's functions were to "receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates" ; and that the procedure for examining petitions of the inhabitants of the mandated territories was not approved by the League Council until 31 January 1923.

Judge van Wyk expressed the view that the Commission had no independent powers and no legislative powers and that its function was limited to advising the Council. However, he pointed out that any such interpretation of the mandate by the Commission, as was accepted by the League Council, became a precedent to which a prudent mandatory would have due regard. He also quoted Professor Quincy Wright, who had said that a Commission's report pointing out conflict between the Mandatory's policies and actions and the provisions of the mandate, which report was adopted by the League Council, became binding upon the Mandatory. In this regard Judge van Wyk pointed out that any precedent thus established did certainly not become a "binding law which had to be applied by each and every mandatory, irrespective of its particular circumstances."

Professor Quincy Wright, as quoted by Judge van Wyk, also expressed the view that the Commission "felt obliged to

limit its criticism by law." Judge van Wyk pointed out that the "Commission on one occasion, and individual members thereof on a few occasions, appeared to have been critical of certian aspects of some of the Respondent's policies of differentiation." However, in general these policies were approved by the Commission. In this regard, Judge Jessup pointed out that even though the representatives of the Mandatories "were often subjected to severe cross-examination" by the Commission, harsh and violent language was seldom used either during the proceedings or in the resolutions "and the general tendency was to avoid putting a Member 'on the spot'...He also pointed out that the Commission discussed the affairs of the Mandate for South West Africa on many occasions in the absence of the representative of South Africa ; and that on occasions when the latter was present, "it was the regular practice of the Commission to discuss the problems of Mandate privately, either before the representative of the Mandatory was called in or after he had left or both."

(*v*) *Judicial control over performance of the Trust*

(*a*) *Distinction between jurisdictional clauses in different categories of Mandates* :

1966 Judgment

"...The original drafts contained no jurisdictional clause. Such a clause was first introduced in connection with the 'B' mandates by one of the States participating in the drafting, and concurrently with proposals made by that same State for a number of detailed provisions about commercial and other "special interests" rights (including missionary rights) for member States of the League. It was little discussed but, so far as it is possible to judge from what is only a summary record, what discussion there was centred mainly on the commercial aspects of the mandates and the possibility of disputes arising in that regard over the interests of nationals of

members of the League...In the same way, the original drafts of the 'C' mandates, which in a different form contained broadly all that now appears in the first four articles of the Mandate for South West Africa, had no jurisdictional clause and no "missionary clause" either. The one appeared when the other did.

"The inference to be drawn from this drafting history is confirmed by the very fact that the question of a right of recourse to the Court arose only at the stage of the drafting of the instruments of mandate, and that as already mentioned, no such right figured among the "securities" for the performance of the sacred trust embodied in the League Covenant.

"After going through various stages, the jurisdictional clause finally appeared in the same form in all the mandates, except that in the case of the Mandate for Tanganyika (as it then was) a drafting caprice caused the retention of an additional paragraph which did not appear, or had been dropped in all the other cases. Once the principle of a jurisdictional clause had been accepted, the clause was then introduced as a matter of course into all the mandates....."[60]

Dissenting opinions

JUDGE KORETSKY

"It is necessary to turn to the history of the inclusion of the jurisdictional clause in the mandate instrument. It is a fact that the Mandates Commission (usually called the Milner Commission) was set up in June 1919 for the purpose of drafting mandate instruments 'B' and 'C'. There were two tendencies that arose at once (a) to

60 *South West Africa (second phase) Judgment, 1966*, pp. 43-44.

defend first of all the interests of commercial and industrial circles (this was reflected in seeking to include in the draft clauses concerning the "open door", and "commercial equality"), and (b) to protect indigenous peoples. The French member of the Commission (M. Simon) expressed the view "that the idea of commercial equality preceded that of the Mandates, that it embraced the whole theory of the Mandates, that the Mandates had been devised to ensure : (1) commercial equality ; (2) the production of indigenous populations and that "the Mandate could not exist without those two conditions." *Translation.*] But the President of the Commission (Lord Milner) did not agree with this—He said :

[*Translation*]

"He maintained that the 'C' Mandate differed from the 'B' Mandate precisely in respect of commereial equality. Territories which came within the category of the 'C' Mandate were attached to the State of the mandatory Power and were consequently subject only to the stipulations concerning the protection of indigenous peoples. . . ."

"And this difference between the two kinds of mandates 'B' and 'C' resulted in two kinds of jurisdictional clauses in drafts relating to them.

"The draft of mandate 'B' had Article 15 which consisted of two paragraphs : one which corresponds to the present Article 7(2) of the Mandate . . . . ."[61]

And

". . . . .A 'C' mandate had (and has) no provisions which could be connected (directly at least) with the specific legal rights and interests of members States on

61 *South West Africa (second phase) Judgment, 1966,* pp. 243-244.

their nationals (save perhaps in some measure Article 5, which was added for reasons which were not aimed at protecting direct State interests). And accordingly the draft of a 'C' mandate had no paragraph 2 analogous to that of a 'B' mandate."[62]

JUDGE JESSUP

"The original Milner draft for 'C' mandates contained provisions about slavery, forced labour, control of arms traffic, alcoholic beverages, military service and fortifications, but nothing on the requisite consent of the Council of the League for modifications of the terms of the mandate and no adjudication clause as in eventual Article 7."[63]

And

"At the fourth session, later on 9 July, it is correct that Colonel House suggested that they consider Article 15 of the American draft—the adjudication clause. The ensuing debate was on the procedural question whether suits in the International Court could be initiated by individual citizens—as suggested in the second paragraph of the American text—or whether it should, in accordance with traditional diplomatic practice in claims cases, be left to the State to espouse the claims of its citizens and act as plaintiff on their behalf."[64]

And

"At this time (9 August), there were available two precedents, the adjudication clause in two paragraphs in the two 'B' mandates, and the adjudication clause in one

62 *South West Africa (second phase) Judgment, 1966,* p. 245.

63 *Ibid.,* p. 356.

64 *Ibid.,* p. 358.

paragraph in the 'C' mandate. In drafting the 'A' mandate the American draftsmen could have chosen either one of these two formulae. They chose to take the formula containing the two paragraphs since the other articles of the draft included detailed specification of economic, commercial, archaeological and other rights. But Lord Milner informed the Secretary-General of the Peace Conference by a letter of 14 August that since the French representative was opposed to dealing with 'A' mandates at that time, the American draft was withdrawn."

"The French document cited above contains a note to the effect that the texts of the 'B' and 'C' mandates had been referred to the drafting committee of the Peace Conference, which had not discussed the merits but had put them in the form of treaties. The texts of the 'B' Mandates to Great Britain and the Belgium for East Africa are then printed; the texts of Article 15—the adjudication provision in two paragraphs—is identical in the two Mandates. The text of the 'C' Mandates for South West Africa, for Nauru, for Samoa, for possessions south of the Equator except Samoa and Nauru, and for islands north of the Equator, are printed and the adjudication clause is the same in each one although in some mandates it is No. 8 and in others No. 9. . . . . "[65]

Comments

The Court, in its 1966 Judgment, points out that the right of recourse to the Court was not included in the securities for the performance of the trust provided in the League Covenant. Judge Koretsky further points out that the Mandates Commission, which is popularly known as the Milner Commission, was set up in June 1919 for the purpose of drafting instruments for the 'B' and 'C' mandates.

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65 *South West Africa (second phase) Judgment, 1966*, p. 364.

The Court also pointed out that the original mandate drafts did not contain any jurisdictional clause and that the clause was first introduced in the drafts of 'B' mandates and that too concurrently with the provisions about commercial and missionary rights for League Members, and was discussed mainly in connection with the disputes involving the commercial matters and interests of the nationals of the League Members. Further, the Court, as also the dissenting Judge Jessup, pointed out that the original draft for 'C' mandate did not contain any jurisdictional clause. According to Judge Koretsky, two tendencies could be seen during the initial discussions of the mandates system by the Mandates Commission, viz., "(a) to defend first of all the interests of commercial and industrial circles (this was reflected in seeking to include in the draft clauses concerning the "open-door", and "commercial equality"), and (b) to protect indigenous population" M. Simon, the French representative on the Milner Commission was of the view that the Mandates system was based upon the two essential conditions of, and was devised to ensure : (1) commercial equality and (2) the protection of indigenous population, and that the idea of commercial equality preceded that of the Mandates.

On the other hand, Lord Milner, president of the Mandates Commission said that whereas 'B' mandates embraced also the idea of commercial equality, the 'C' mandates, being attached to the Mandatories, did not embrace the same, and "were consequently subject only to the stipulations concerning the protection of indigenous peoples." This difference in the purposes behind the 'B' and 'C' mandates resulted in the two kinds of jurisdictional clauses for these mandates. On the other hand, the Court, in its 1966 Judgment, pointed out that the clause appeared in a 'C' mandate simultaneously with the "missionary clause". (See Annexure II to this Study).

According to Judge Jessup, the adjudication clause, as embodied in Article 15 of the American draft for 'B' mandates,

was put forth by Colonel House on the fourth session of the Commission on 9 July. The said draft in the second paragraph provided that "suits in the International Court could be initiated by individual citizens" from the States Members of the League. During the debate on the said provision certain representatives expressed disagreement and instead suggested that "it should, in accordance with traditional diplomatic practice in claims cases, be left to the State to espouse the claims of its citizens and act as plaintiff on their behalf". It may be noted here that the latter viewpoint prevailed in the long run.

By August 9 two precedents for the adjudication clause were available—the clause in the two 'B' mandates had two paragraphs, while that in a 'C' mandate had only one pragraph. In drafting the 'A' mandate the American draftsman adopted the former "since the other articles of the draft included detailed specification of economic, commercial, archaeological and other rights." However, the said draft was withdrawn as a result of the French opposition to dealing with 'A' mandates at that time.

The adjudication clause, as provided in Article 15 in the final drafts of the two 'B' mandates to Great Britain and to Belgium for East Africa, was identical in each of them, "except that in the case of the Mandate for Tanganyika (as it then was) a drafting caprice caused the retention of an additional paragraph which did not appear, or had been dropped in all other cases." Similarly, the clause was identical in each of the 'C' mandates for South West Africa, for Nauru, for Samoa and for other territories south and north of the Equator. According to Judge Koretsky, the adjudication clause embodied in the present Article 7 (2) of the mandate for South West Africa corresponds to the first paragraph of Article 15 of a 'B' mandate. (See Annexure II to this Study). He also pointed out that a 'C'mandate had no second paragraph corresponding to that of a 'B' mandate, inasmuch as the former mandate was not concerned "with the specific legal rights and interests of the member States or their nationals (save perhaps in some measure Article 5,

which was added for reasons which were not aimed at protecting direct State interests)."

(*b*) *Mechanism of Judicial Control* :

1950 Advisory Opinion

". . . Each member of the League had a legal interest, *vis-a-vis* the Mandatory Power, in matters 'relating to the interpretation or the application of the provisions of the Mandate'; and had a legal right to assert its interest against the Union by invoking the compulsory jurisdiction of the Permanent Court (Article 7 of the Mandate Agreement) . . . " [66]

1962 Judgment

"In the first place, judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. . . 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 resources to the Court against possible abuse or breaches of the Mandate."[67]

And

"In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of

66 *International Status of South West Africa, Advisory Opinion* : I.C.J. Reports 1950, p. 165.

67 *South West Africa Cases (Preliminary Objections) Judgment, 1962*; I.C.J. Reports, 1962, p. 336.

the 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."[68]

1966 Judgment

"Unlike the final version of the jurisdictional clause of the Mandate as issued by the Council and adopted for all the mandates, by which the Mandatory alone undertook to submit to adjudication in the event of a dispute with another member of the League, the original version would have extended the competence of the Court equally to the disputes referred to it by the Mandatory as plaintiff, as well as to disputes arising between other members of the League *inter se*. The reason for the change effected by the Council is directly relevant to what was regarded as being the status of the individual members of the League in relation to the Mandate. The reason was that, as was soon perceived, an obligation to submit to adjudication could not be imposed upon them without their consent..."[69]

Separate opinion

JUDGE VAN WYK

"If the Court had been intended to fulfil this special role of protection of the sacred trust a provision to that effect would have been embodied in the Covenant, and it

68 *South West Africa (second phase) Juagment. 1966*, p. 237,338.

69 *Ibid.*, p. 27.

would not have been left to the Council to include this "super security" in the mandate declaration. . . .Furthermore, even supposing that this important provision relating to the Court's special role had been intentionally omitted from the Covenant because it was thought that it would be included in the instruments of the mandate, one would have expected that at the time the Covenant was signed some reference to this would have been made. . . . ."[70]

Dissenting opinions

JUDGE WELLINGTON KOO

". . . . the authors of the mandates system could not have been unaware of human frailties and therefore the unrealistic nature of any hope and faith on their part that every mandatory could always be relied upon to show an indentity of views with the Council on a given matter relating to the particular mandate, or to manifest a never failing spirit of accommodation to yield to the views of the Council in the interest of the peoples of the territories under mandate. To meet such a contingency, however rare it might be, and equally conscious of the primary purpose of the mandates system, the authors of the mandate instruments, appointed by the Principal Allied and Associated Powers in 1919, introduced the adjudication clause first in 'B' mandates and latter in 'C' mandates, and used the same text for both categories, in order to provide a means of judicial protection of the interests of the said inhabitants through the exercise by individual Members of the League of their substantive right or legal interest in the observance of the mandate obligations towards them by the respective mandatories."[71]

70 *South West Africa Cases (second phase) Judgment 1966*, p. 74.

71 *Ibid.*, p. 219.

JUDGE KORETSKY

" . . . It was said that it was rather difficult to settle disputes relating to the Mandate in the Council as under the unanimity rule the vote of a Mandatory was a deciding one, that it would sometimes be more convenient to turn a dispute relating to the interpretation or the application of the provisions of the Mandate into the channel of calm judicial consideration.

"But who was entitled to institute proceedings against a Mandatory? Neither the League itself nor its Council could bring an action in the Court. And then the right to apply to the Court in defending the "common cause" was entrusted to any Member of the League.

"Was this something strange at that time? I venture to cite an excerpt from a pamphlet of the League : *La Cour Permanente de Justice internationale* (Geneva, 1921, p. 19)

[*Translation*]

"The question has been raised whether the principal organs of the League—above all, the Council—should not be able, as such, to be a party to a dispute before the Court. This idea has, however, been discarded both by the Council at its Brussels meeting and by the Assembly. On the other hand, it is understood, as is expressly stated in the report on the Statute approved by the Assembly, that groups of States may appear as a party. Consequently, there is nothing to prevent the individual States represented, at a given moment on the Council from instituting an action collectively, but not as the Council of the League. This possibility may prove to be of special value when it comes to enforcing certain stipulations of the treaties concerning the protection of racial, religious, etc., minorities. . . . ."[72]

72 *South West Africa (second phase) Judgment, 1966,* p. 246.

JUDGE TANAKA

"As we have seen above, it is argued that the supervision of the Mandate belongs to the Council of the League and to this body only, not to individual Members of the League; therefore they possess no right to invoke the Court's jurisdiction in matters concerning the general administration of the Mandate, nor does the Court possess power to adjudicate on such matters.

"However, the existence of the Council as a supervisory organ of the Mandate cannot be considered as contradictory to the existence of the Court as an organ of judicial protection of the Mandate. The former, being in charge of the policies and administration of the Mandatory and the latter, being in charge of the legal aspects of the Mandate, they cannot be substituted the one for the other and their activities need not necessarily overlap or contradict one another. They belong to different planes. The one cannot be regarded as exercising appellate jurisdiction over the other."[73]

JUDGE JESSUP

"...Paragraph 1 of Article 22 has been quoted above with particular emphasis upon the words "and that securities for the performance of this trust should be embodied in this Covenant." Since there is reference in the further paragraphs of Article 22 to the Council of the League and also to "a permanent commission" but no mention whatever of the Permanent Court of International Justice, it has been argued that resort to the Court as ultimately provided for in paragraph 2 of Article 7 of the Mandate is not one of the "securities for the performance of this trust" and therefore must

73 *South West Africa (second phase) Judgment, 1966,* p. 958.