have some lesser or different role. In rejecting this point of view, it must be noted that the quoted text of paragraph 1 of Article 22 does not say "all the securities" or even "the securities", which would have the same meaning...It surely was not *ultra vires* the Council to confirm the inclusion in the Mandate of Article 7 with its two safeguards—one requiring the Council's consent to any modification and the other providing for recourse to the Permanent Court of International Justice."[74]

Comments

Judge Koretsky pointed out that on account of the unanimity rule attaching to a decision by the League Council, the vote of a Mandatory became a deciding one inasmuch as the latter could veto any decision by the Council ; and that, due to the said rule, settlement of disputes relating to Mandate in the Council was found to be difficult. According to Judge Wellington Koo, the authors of the mandates system could not be sure "on their part that every mandatory could always be relied upon to show an identity 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 interests of the peoples of the territories under mandate." In order to make the settlement of disputes possible in such a contingency and (in the words of Judge Koretsky) thinking "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", they introduced an adjudication clause providing for the right of a League Member to have recourse to the Permanent Court of International Justice for adjudication by that Court of a dispute of the aforesaid nature.

The Court, in its 1962 Judgment, regarded the judicial protection of the sacred trust to be "an essential feature of

74 *South West Africa (second phase) Judgment, 1966,* pp. 396-397.

the Mandates System." It expressed the view that while administrative supervision by the League of the performance of the trust towards the peoples of the mandated territories constituted the normal security, the judicial control and supervision by the Court served as the final bulwark of protection of the interests of these peoples and against possible abuse or breaches of the trust by the mandatory Powers. Judge Tanaka expressed the view that the supervision of the Mandate by the League Council and judicial protection of the Mandate by the Court were not contradictory to each other ; that the Council supervised the policies and administration of the Mandatory, while the Court dealt with the legal aspects of the mandate ; that they cannot be substituted the one for the other; and that "the one cannot be regarded as exercising appellate jurisdiction over the other."

Judge van Wyk emphasized the fact that the Covenant nowhere mentioned anything about the judicial protection of the sacred trust, and doubted whether the Court had been intended to fulfil the special role given to it in the Mandates in regard to such protection. However, Judge Jessup expressed the view that the fact that the Covenant does not mention the judicial protection, which was ultimately provided by Article 7(2) of the Mandate, does not mean that the same is not one of the "securities for the performance of the trust" or has "some lesser or different role." He pointed out that paragraph 1 of Article 22 of the Covenant does not say "all the securities", and as such it "surely was not *ultra vires* the Council to confirm the inclusion in the Mandate of Article 7 with its two safeguards—one requiring the Council's consent to any modification, and the other providing for recourse to the Permanent Court of International Justice." (See Annexures I and II to this Study).

Judge Wellington Koo pointed out that the judicial protection of the interests of the inhabitants of the mandated territories was sought to be accomplished by conferring a right on the individual members of the League to have recourse to

the Court in matters relating to the interpretation or application of the provisions of the mandate. The Court, in its 1950 Advisory Opinion, also referred to the said right of each member of the League, who could assert the same against a Mandatory by invoking the jurisdictional clause of the mandate agreement. Judge Tanaka referred to the argument that the League Members had no such right, nor did the Court had the jurisdiction to deal with such matters inasmuch as the supervision of the Mandates System belonged to the League Councjl alone, and at present belongs to the United Nations alone.

In this connection the Court, in its 1962 Judgment, and Judge Koretsky in his dissenting opinion to the 1966 Judgment, pointed out that the League as well as the Council lacked capacity to bring an action against a Mandatory in the Court and to invoke the judicial protection of the trust ; and that the task of impleading the Mandatory before the Court for the purpose of protecting the trust judicially, was accomplished through the instrumentality of conferring the right to bring disputes concerning mandates before the Court on the individual League Members. According to the Court, "it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision." The same method was utilized for "enforcing certain stipulations of the treaties concerning the protection of racial, religious, etc., minorities." Richard A. Falk points out that the aforesaid "construction of the mandates system is clearly repudiated by the Court in 1966 ; the requirement of unanimity in League voting is relied upon in the latter decision to demonstrate the intention to avoid the judicial creation of legal obligations binding on the Mandatory whereas in 1962 this same voting requirement was, as we have seen, invoked to establish the necessity for vesting judicial protection in the Members of the League."[75]

75 In his article on "The South West Africa Cases", *International Organisation*, Vol. XXI, No. 1, Winter 1967, p. 12.

Giving reasons for the obligation to submit to adjudication being cast upon the Mandatory alone and not upon the League Members as well, the Court in its 1966 Judgment, pointed out that the earlier versions of the jurisdictional clause had postulated such obligation equally upon the Mandatory and any other League Member, and sought to enable the Mandatory to come before the Court as a plaintiff. However, it was later realized that an obligation to submit to adjudication could not be cast upon the League Members without their consent, and consequently the jurisdiction of the Court, under the clause, was confined to the disputes relating to mandates brought against the Mandatory by any member of the League.

5. Role of League Members vis-a-vis the Mandates System

1950 Advisory Opinion

> "These obligations (of the Mandatory) have one point in common. 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). Further, each member, at the time of dissolution, had substantive legal rights against the Union in respect of the Mandate."[76]

1966 Judgment

> "Accordingly, viewing the matter in the light of the relevant texts and instruments, and having regard to the structure of the League, within the framework of which the mandates system functioned, the Court considers that even in the time of the League, even as members of the

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

League when that organization still existed, the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'. This right was vested exclusively in the League, and was exercised through its competent organs. Each member of the League could share in its collective, institutional exercise by the League, through their participation in the work of its organs, and to the extent that these organs themselves were empowered under the mandates system to act. By their right to activate these organs (of which they made full use), they could procure consideration of mandate questions as of other matters within the sphere of action of the League. But no right was reserved to them, individually as States, and independently of their participation in the institutional activities of the League, as component parts of it, to claim in their own name,—still less as agents authorized to represent the League,—the right to investigate the sacred trust,—to set themselves upon as separate custodians of the various mandates. This was the role of the League organs.

"To put this conclusion in another way, the position was that under the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League—in particular to its Council—and were not additionally and separately responsible to each and every individual State member of the League. If the latter had been given a legal right or interest on an individual "State" basis, this would have meant that each member of the League, independently of the Council or other competent League organ, could have addressed itself directly to every mandatory, for the purpose of calling

for explanations or justifications of its administration, and generally to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose."[77]

Separate opinion

JUDGE VAN WYK

"... There is in any event no evidence to be found anywhere to support the statement that the rights and duties of ensuring performance were in addition to the rights and duties of the organs of the League—conferred on all the members of the League. It follows that the suggestion that individual members of the League were given powers of administrative supervision over the mandatories is unfounded....."[78]

Dissenting opinions

JUDGE WELLINGTON KOO

"In other words the legal right or interest of the League Members individually as well as collectively through the Assembly of the League in the observance of the mandates by the mandatories originated with and inherent in the mandates system, as has been demonstrated above, and an adjudication clause was inserted in each mandate not to confer this right or interest, which is already necessarily implied in Article 22 of the Covenant and in the mandate agreement, but to bear testimony to its possession by the League Members and to enable them, if need be, to invoke, in the last resort, judicial protection of the sacred trust."[79]

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77 *South West Africa (second phase) Judgment, 1966*, pp. 28-29.

78 *Ibid.*, p. 73.

79 *Ibid.*, p. 219.

JUDGE TANAKA

"The interest which the member States of the League possess regarding the proper administration of the mandated territory by the Mandatory is possessed by Members of the League individually, but it is vested with a corporate character. Each Member of the League has this kind of interest as a Member of the League, that is to say, in the capacity of an organ of the League which is destined to carry out a function of the League."[80]

JUDGE JESSUP

"It is not always easy to distinguish between actions of the League or its organs as corporate bodies and actions of the States which composed the League. I am not concerned here to reach a conclusion whether the League of Nations had separate international juridical personality but I am concerned with a realistic appraisal of its activities as an organization. In connection with the problems here under discussion, importance must be attached to the views and attitudes of Governments and their spokesmen in the nineteen-twenties. One may take as a back-drop certain statements in 1923 and 1924 by one of the great proponents of the League, Lord Robert Cecil :

> "From a constitutional point of view, the League of Nations was nothing but the Governments which composed it." (League of Nations, *Official Journal*, 1923, p. 938).

> "The League was not a super-national organization ; it was nothing more than the Governments represented in its Council and at its Assembly—— Influence could therefore never be usefully exerted on the League as a corporate body, but only on the individual Governments which composed it." (*Ibid.*, 1924, p. 329-330). "——he was a little afraid of any proposals which might have the effect of transforming the Council into a body seeking to achieve the suppression of slavery by its own initiative. The Council had been created solely for the purpose of enabling Governments to cooperate and to assist them whenever necessary." (*Ibid.*, p. 331)[81]

80 *South West Africa (second phase) Judgment, 1966*, p. 262.

Comments

The Court, in its 1966 Judgment, expressed the view that the supervision of the mandate belonged to the League Council; that the League members took part in the same only through their participation in the work of the Council in connection with mandate affairs ; and that they possessed no right to require due performance by the Mandatory, of the trust, independent of, or in addition to, that of the Council. It also emphasized that a grant of any such right to the individual Members of the League "would have meant that each member of the League, independently of the Council or other competent League organ, could address itself directly to every mandatory, for the purpose of calling for explanations or justifications of its administration, and generally to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose." Judge van Wyk found that there was no evidence to support the view that individual League members had a right, independent of the League or its organs, to ensure due performance of the mandate and any suggestion that they had a right to any supervision over the mandate was unfounded.

However, according to Judge Jessup, it was not easy to distinguish between the actions of the organs of the League

81 *South West Africa (second phase) Judgment, 1966*, p. 390.

as corporate bodies and those of the individual League members, in so far as a realistic appraisal of the activities of the League are concerned. He quoted Lord Robert Cecil, who was of the view that the League, from a constitutional point of view, was nothing but its Member States and that "influence could therefore never be usefully exerted on the League as a corporate body, but only on the individual Governments which composed it." Judge Tanaka expressed the view that the League Members individually were the organs of the League destined to carry out its functions and possessed the legal interest in the proper administration of the mandate though the same was vested with a corporate character." Further, the Court, in its 1950 Advisory Opinion, emphasized the legal right of each League Member in matters "relating to the interpretation or the application of the provisions of the Mandate", which was asserted "against the Union by invoking the compulsory jurisdiction of the Permanent Court (Article 7 of the Mandate Agreement—see Annexure II to this Study.) The Court, as well as Judge Wellington Koo in his dissenting opinion to the 1966 Judgment, also emphasized the individual and collective substantive legal rights of the League Members in the observance of the mandate by the mandatory—the collective ones being exercised through the League organs. According to Judge Koo "the adjudication clause was inserted in each mandate not to confer this right or interest——but to bear testimony to its possession by the League Members and to enable them, if need be, to invoke in the last resort, judicial protection of the sacred trust."

Further, as has also been noted in the previous item of this Chapter, the League or its Council could not appear as a party before the Court, and as such the task of adjudication of a dispute relating to a mandate, was sought to be accomplished by enabling the League Members to bring any such dispute before the Court, and to act thereby as an instrumentality of thejudicial protection of the mandate.

6. Modification of the terms of the mandate

1966 Judgment

Dissenting opinions

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 modification of the terms of the mandate...

"The second meeting of the Commission was on 8 July.....Thus, Colonel House suggested inserting in the 'C' draft, Article 14 of his 'B' draft which, in expanded form, deals with the necessity for the consent of the Council to any changes, as is now recorded in paragraph 1 of Article 7 of the South West Africa 'C' mandate."[82]

JUDGE PADILLA NERVO

"The Union has no competence to modify unilaterally the international status of the territory, as is shown by Article 7 of the Mandate. The competence to determine and modify the international status of South West Africa rests with the Government of South Africa acting with the consent of the United Nations."[83]

Comments

Judge Jessup has pointed out that the original Milner draft for 'C' mandates did not contain a provision concerning the procedure of modification of the mandate agreement, and that, at the meeting of the Commission on July 8, 1919, Colonel House introduced a clause, based on Article 14 of

82 *South West Africa (second phase) Judgment 1966*, pp. 356-357.

83 *Ibid.*, p. 460.

his 'B' draft, providing for "the necessity for the consent of the Council to any changes, as is now recorded in paragraph 1 of Article 7 of the South West Africa 'C' mandate." Judge Padilla Nervo, while denying the right of the mandatory to modify the mandate or the status of the mandated territory unilaterally, expressed the view that the right to do so "rests with the Government of South Africa with the consent of the United Nations. (See Annexure II to this Study).

CHAPTER IV

SURVIVAL OF THE MANDATE AND OF ADMINISTRATIVE SUPERVISION AND JUDICIAL CONTROL OVER THE MANDATED TERRITORY ON DISSOLUTION OF THE LEAGUE

1. *The controversy.*
2. *Whether the mandate was deemed to be a contract or an international institution ?*
3. *Other bases of the controvesy.*
4. *The controversy examined in the light of original terms of the mandate.*
5. *The controversy examined in the light of events immediately preceding dissolution of the League.*
6. *The controversy examined in the light of the provisions of the U. N. Charter.*
7. *The controversy examined in the light of the proceedings of the United Nations.*
8. *Legal position of other mandates and agreements similar to mandates.*
9. *Respondent's contention would forfeit its right to administer the territory.*
10. *Whether there is an obligation of the mandatory to submit annual reports to the United Nations ?*
11. *Respondent's obligation to transmit petitions to the United Nations.*
12. *Whether the jurisdictional clause survived the dissolution of Permanent Court of International Justice ?*
13. *Conclusions.*

1. The Controversy

1950 Advisory Opinion

"that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920 ;

"that 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, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court."[1]

Separate opinion

JUDGE READ

"...The disappearance of the obligations included in the first and the second classes would bring the Mandates System to an end. The disappearance of the regime of report, accountability, supervision and modification, through the Council and the Permanent Mandates Commission, might weaken the Mandates System ; but it would not bring it to an end. As a matter of fact, the record shows that the paralysis of those agencies during six war years had no detrimental effect upon the maintenance of the well-being and development of the peoples."[2]

1 *International Status of South West Africa, Advisory Opinion*, I.C.J. Reports 1950, at p. 143.

2 *Ibid.*, at p. 165.

1962 Judgment

Dissenting opinion

SIR PERCY SPENDER AND
SIR GERALD FITZMAURICE

"...we think that the view expressed by the Court in its 1950 opinion, to the effect that the supervisory functions of the former League Council passed to the Assembly of the United Nations which was entitled to exercise them was definitely wrong."[3]

1966 Judgment

JUDGE VAN WYK

"...On the dissolution of the League...either the whole Mandate lapsed or at least those provisions, including Article 7, which depended on the existence of the League ceased to apply..."[4]

And

"It has been submitted that some passages in the Judgment of the Court in *South West Africa Cases*, I.C.J. Reports 1962, could be interpreted as supporting the Court's majority opinion of 1950 in regard to the transfer to the United Nations of the supervisory powers of the League in respect of Mandates. There are, however, no express findings to this effect, and the impression gained from the Judgment as a whole is that as far as possible this issue was deliberately avoided, and that the Court did not intend expressing any opinion thereabout..."[5]

Dissenting opinions

JUDGE TANAKA

"...All claims and complaints of the Applicants, being concerned with the interpretation and application

3 *South West Africa Cases, Preliminary Objections, Judgment*, I.C.J. Reports 1962, at p. 532, footnote 2.

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

5 *Ibid.*, at p. 134.

of the Mandate, are based on the continual existence of the Mandate; consequently, if its existence could not be proved, they would necessarily fall away.

"The Applicants' Final Submissions Nos. 1 and 2 deal with the matter of the survival of the Mandate. Submission No. 1 reads as follows :

> "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."

"By Submission No. 1, the Applicants define the international status of the Territory of South West Africa and contend that this status is not merely an historical fact, but continues to the present time.

"By Submission No. 2, the Applicants further contend the continuation of the international obligations of the Respondent as Mandatory. It reads as follows :

> "Respondent 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 obligations 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 petitions are to be submitted."

"The Respondent's final submissions (C.R. 65/95, pp. 53-54) which are the same as set forth in the *Counter-Memorial*, Book I, page 6, and the *Rejoinder* Volume II, page 483, particularly contend in regard to the question

of the lapse or otherwise of the Mandate on the dissolution of the League as follows :

> "1. That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations, and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.
>
> 2. In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations :
>
> (a) Relative to Applicants' Submissions Nos. 2, 7 and 8,
>
> that Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League..."[6]

JUDGE JESSUP

"...In effect reversing its Judgment of 21st December 1962, it rejects the Applicants' claims *in limine* and precludes itself from passing on the real merits. The Court therefore has not decided, as Respondent submitted, "that the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder."

"Further the Court has not decided, as submitted by the Respondent in the alternative, that the Mandatory's former obligations to report, to account and to submit to

6 *South West Africa (second phase) Judgment, 1966,* at pp. 263-264.

supervision had lapsed upon the dissolution of the League of Nations."[7]

Comments

Judge Tanaka, in his dissenting opinion to the 1966 Judgment, expressed the view that all the claims of Applicants were dependent upon the question of survival of the Mandate on dissolution of the League, and the same would fall to the ground, in case such survival were not established. Justice M. Hidayatullah of the Supreme Court of India also expressed the view that in "the Judgment of the Court two questions were stated to go to the root of the matter : first, whether the Mandate still subsisted..."[8]

As regards the said question, the Applicants contended that the Mandate survived; that the international status of the territory continued after dissolution of the League; and that the Union of South Africa continued to be under international obligations stated in the Covenant and the Mandate. On the other hand, the Respondent contended that the whole Mandate had lapsed on the dissolution of the League; and that the Respondent was no longer subject to any obligations under the same. It may be remarked here that in its 1966 Judgment the Court did not express any specific view on the subject, but its treatment of the case discloses that it proceeded on the assumption of survival of the Mandate. Judge Jessup has expressed the view that the Court did not decide the question and the Respondent's contention.

In its 1950 Advisory Opinion the Court found that South West Africa continues to be a territory under the Mandate; and that "South Africa continues to have international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate." Judge Read, in his separate opinion,

7 *South West Africa (second phase) Judgment, 1966*, at pp. 330-331.

8 In his book on *The South West Africa Case*, at p. 38.

expressed the view that the disappearance of the League "might weaken the Mandates System; but it would not bring it to an end" and that the paralysis of the League organs during Second World War did not affect the operation of the System. In its 1962 Judgment, the Court treated the case, while proceeding on the assumption of survival of the Mandate. However, Judge van Wyk, in his separate opinion to the 1966 Judgment, was of the view that on disolution of the League, "either the whole Mandate lapsed or at least those provisions, including Article 7, which depended on the existence of the League ceased to apply."

On the question whether on dissolution of the League the administrative supervision of the Mandate passed on to the United Nations, the Applicants contended that the Respondent continued to be under obligations to "transmit petition from the inhabitants of the Territory, the supervisory functions to be exercised by the United Nations to which the annual reports and petitions are to be submitted." On the other hand, the Respondent contended that its obligations "to report and account to, and to submit to the supervision of the Council of the League of Nations, lapsed upon the dissolution of the League." In its 1966 Judgment, the Court, according to Judge Jessup, did not decide in favour of the aforesaid contention of the Respondent.

However, in its 1950 Advisory Opinion, the Court had found that South Africa continues to be under international obligation to submit to the supervision of the Mandate by the United Nations and to transmit to the latter the annual reports and the petitions from the inhabitants of the territory. Judge Read, in his separate opinion, agreed with this finding. In its 1962 Judgment also, the Court expressed the view that the supervisory functions, after the dissolution of the League, passed on to the United Nations. However, Sir Percy Spender and Sir Gerald Fitzmaurice, in their joined dissent, regarded the finding of the Court in its 1950 Advisory Opinion to be "defini-

tely wrong." Judge van Wyk, in his separate opinion to the 1966 Judgment, did not agree with the view that in its 1962 Judgment the Court supported its aforesaid finding in 1950, and was of the view that, in 1962, the Court made no express findings on the question and deliberately avoided the issue inasmuch as it "did not intend expressing any opinion thereat." Mr. Richard A. Falk has expressed the view that the question, 'whether the General Assembly succeeded to the role of the League....was settled affirmatively by the I. C. J. in its unanimous Advisory Opinion of 1950 and never subsequently contradicted. Even if this line of reasoning is accepted, South Africa can emphasize that it is not bound by I. C. J. determinations that are set forth in an Advisory Opinion."[9]

2. Whether the Mandate was deemed to be a Contract or an International Institution?

1950 Advisory Opinion

Separate opinion

SIR ARNOLD McNAIR

". . . the Mandate created a status for South West Africa. This fact is important in assessing the effect of the dissolution of the League. This status *valid in rem* supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving obligations between the Union and other former Members of the League. 'Real' rights created by an international agreement have a greater degree of permanence than personal rights. . . ."[10]

9 In his article on "The South West Africa Cases", *International Organisation*, Vol. XXI, No. 1, Winter 1967, at p. 18.

10 *International Status of South West Africa, Advisory Opinion*, I.C.J. Reports 1950, pp. 156-157.

1966 Judgment

Separate opinion

JUDGE VAN WYK

"The possibility of the dissolution of the League at some future date was not contemplated at the time, and there would, therefore, not have been any agreement or intention as to what would happen to the Mandate in such an event...

...The probability is that their intention would have been that if they, as Members of the League, were to dissolve the League without providing for the transfer of its powers to another organization, those provisions which depended on the existence of the League would simply cease to apply. In the circumstances that would obviously have been their intention..."[11]

Dissenting opinions

JUDGE WELLINGTON KOO

"These obligations constitute a fundamental feature of the Mandates System. The dissolution of the League of Nations and the disappearance of the Council and Permanent Court did not terminate them. By virtue of Article 37 of the Statute the compulsory jurisdiction of the Permanent Court was transferred to the present Court. In regard to the obligation of international accountability as embodied in the relevant provisions of the Covenant and the Mandate for South West Africa, it had, by virtue of the principle of severability under international law, remained in existence though latent after the disappearance of the Council and the Permanent Mandates Commission of the League. It only required an arrangement as envisaged in the resolution on Mandates unani-

11 *South West Africa (Secondphase) Judgment, 1966*, at pp. 87-88.

mously adopted by the Assembly of the League of Nations at its last meeting on 18th April 1946, including the concurrence of the Respondent."[12]

JUDGE TANAKA

"From the point of view of purely juridical formalism, there is the conclusion that, so far as the Mandate is conceived as a contract between the two parties, namely the League of Nations on the one hand and the Mandatory on the other, the dissolution of the League would produce, as a necessary consequence, the absolute extinction of the Mandate with all its legal vincula and that nothing remains thereafter. This is the fundamental standpoint upon which the arguments of the Respondent are based. This pure logicism is combined with strict voluntarism according to which all legal consequences attached to a juridical act are conceived as the effect of the will or intent of the parties..."[13]

And

"The only important matter is that a "sacred trust of civilisation" is conscientiously carried out by the Mandatories. The Mandate, inspired by the spirit of a "sacred trust of civilization", once created by an international agreement between the two parties, the League on the one hand and the Mandatory on the other, enjoys its perpetual objective existence. The continual existence of the organized international community guarantees the objectivity and perpetuity of the Mandate as an international institution....."[14]

And

"The recognition of the institutional side of the Mandate beside its contractual side by the 1950 Advisory

12 *South West Africa (second phase) Judgment, 1966*, at p. 235.
13 *Ibid.*, at p. 269,
14 *Ibid.*, at p. 270.

Opinion and the 1962 Judgment can confer on the Mandates System a durability beyond the life of the League and an objective existence independent of the original or ulterior intent of the parties. This recognition is nothing else but a product of a scientific method of interpretation of the Mandates System, in which the consideration of spirit and objectives as well as social reality of the system play important roles. This method of interpretation may be called sociological or teleological, in contrast with strict juristic formalism. Relying on the concept of the Mandate as an institution of a sociological nature, we take a step forward out of traditional conceptional jurisprudence, which would easily assert the lapse of the Mandate on the dissolution of the League."[15]

JUDGE PADILLA NERVO

"The dissolution of the League was not the funeral of the principles and obligations consigned in the Covenant and the Mandate; they are alive and will continue to be alive.

"The Mandate has not lapsed, but has been, is and will be in existence, as long as South West Africa is not placed under the trusteeship system by agreement between the Republic of South Africa and the United Nations ; or until the time comes when the peoples of the Territory are able to stand by themselves under the strenuous conditions of the world of today, or eventually become an independent State."[16]

JUDGE MBANEFO

"The Respondent in presenting its argument in 1962 did so on the assumption that the Mandate did in some form survive. It had to take that line because if the

15 *South West Africa (second phase) Judgment 1966*, at p.276.
16 *Ibid.*, at pp. 465-466.

Mandate did survive as a treaty or convention in force, it must also have survived in some form in an objective or institutional sense since the territory and the Mandatory are still identifiable. The existence of the Mandate as a treaty or convention assumes its existence as an institution. The issue might arise as to whether all the obligations in the Mandate were enforceable but that is a different matter. The fact is that the Mandate could not survive as a treaty or convention without at the same time surviving in some form as an institution...

"The Respondent in its argument against the survival of the Mandate, in the merits stage, proceeded on the basis that Article 6 was so essential to the Mandate that if, because of the dissolution of the League, it ceased to have any effect, then its disappearance would involve the demise of the Mandate as a whole;—it would carry to its grave all the other obligations which legally would have survival of the Mandate. The distinction between the survival of the Mandate as an institution and its survival as a treaty or convention is drawn only in the sense of showing that the Mandate could survive as an institution—as an embodiment of real right—even though the treaty creating it could have come to an end. But the converse has not been shown to be the case, namely that it could survive as a treaty without at the same time surviving objectively. If the Mandate survived as a treaty or an institution, what survived are the rights and obligations created by the treaty. So that the finding of the Court that the Mandate survived as a treaty or convention in force carries with it the implication that the Mandate might have survived also in an objective or institutional sense. It means that the rights and obligations created by the Mandate remained enforceable at law."[17]

17 *South West Africa (second phase) Judgment, 1966,* at p. 498.

Comments

Judge van Wyk has expressed the view that the authors of the Mandates System did not contemplate the possibility of the dissolution of the League, and that had they cotemplated its dissolution without providing for the transfer of its powers to another organization, their intention would have been to provide that the provisions dependent "on the existence of the League would simply cease to apply."

Judge Tanaka pointed out that the Respondent has argued that the Mandate was a contract between the League and the Mandatory and that censequently the dissolution of the League resulted in "the absolute extinction of the Mandate." This was regarded by Judge Tanaka to be a point of view of purley juridical formalism" "combined with strict voluntarism according to which all legal consequences attached to a juridical act are conceived as the effect of the will or intent of the parties." In the words of the Judge Mbanefo, Respondent's contention was that the League's "disappearance would involve the demise of the Mandate as a whole - it would carry to its grave all the other obligations which legally would have survived with the Mandate." According to Justice M. Hidayatullah[18] of the Supreme Court of India, the Court in its 1962 Judgment regarded the Mandate to be an international agreement, and that Judge Spiropoulous, Judge Basdenant, Sir Gerald Fitzmaurice and Judge Spender, in their dissenting opinions to the 1962 Judgment did not regard it so, as merely an instrument issued by the League Council in the exercise of its executive powers. This plea, according to Justice Hidayatullah was "intended to cut across the question of "consent" deductable from that Article (37 of the Statute) and Article 7 of the Mandate read together." He also pointed out that according to Judge Spiropoulous, the Mandate as a treaty could not have survived the collapse of the League.[19]

18 In his book on *The South West Africa Case* at p. 68.
19 *Ibid.*, at p. 29.

Sir Arnold McNair, in his separate opinion to the 1950 Advisory Opinion, distinguished between the "real" rights and "personal rights" created by an international agreement or treaty and was of the view that the former "have a greater degree of performance than" the latter. Judge Wellington Koo, in his dissenting opinion to the 1966 Judgment, expressed the view that the disappearance of the League did not terminate the obligations which constituted a fundamental feature of the Mandates System." Such obligations, including "the obligation of international accountability", remained intact "by virtue of the principle of severability under international law." Justice Hidayatullah points out that "Judge Jessup in a learned discussion proved that the Mandate was a treaty or convention. He found no difference between the two. He considered the principle of severability of treaties particularly in multipartite treaties, and held that the Mandate survived and was operable even if certain parts of the Resolution were inoperable," [20] that "an international obligation remained valid so long as there was no cause for its extinction and that the extinction could not be preserved."[21] Judge Padilla Nervo was of the view that the Mandate and its principles and obligations would remain in existence until the purpose behind the "sacred trust" was fulfilled, which would be achieved only "when the peoples of the Territory are able to stand by themselves under the strenuous conditions of the world of today, or eventually become an independent State."

According to Lord McNair the Mandate created for the territory, an international status, which was "*valid in rem*" and which supplies the element of permanence unaffected by the disappearance of the League. Judge Tanaka and Judge Mbanefo regarded the Mandate to be an international institution, which though created by a treaty, "enjoys its perpetual objective existence." Judge Tanaka regarded the continual existence of the organized international community as guaranteeing "the objectivity and perpetuity of the Mandate as an international institution". According to him, the Court, in 1950 and 1962, came to recognize the institutional aspect of the Mandate besides its contractual aspect on the basis of a scientific (which may also be called to be sociological or teleological method of) interpretation of the Mandates System, while taking into consideration the spirit, objectives, and the social reality of the system ; such recognition gave to the "system a durability beyond the life of the League and an objective existence independent of the original or ulterior intent of the parties." According to Judge Mbanefo, the Mandate could not survive as a treaty without at the same time surviving as an institution. "The distinction between the survival of the Mandate as an institution and its survival as a treaty or convention is drawn only in the sense of showing that the Mandate could survive as an institution—as an embodiment of real rights—even though the treaty creating it could have come to an end."

20 *Ibid.*, at p. 28.
21 *Ibid.*, at pp. 58-59.

3. Other bases of the controversy

1950 Advisory Opinion

> "The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions."[22]

22 *International Status of South West Africa, Advisory Opinion*, I.C.J, Reports 1950, at p. 136.

1966 Judgment

"It may also be urged that the Court would be entitled to make good an omission resulting from the failure of these concerned to foresee what might happen, and to have regard to what it may be presumed the framers of the Mandate would have wished or would even have made express provision for, had they had advance knowledge of what was to occur. The Court cannot however presume what the wishes and intentions of those concerned would have been in anticipation of events that were neither foreseen nor foreseeable ; and even if it could, it would certainly not be possible to make the assumptions in effect contended by the Applicants as to what those intentions were."[23]

Separate opinion

JUDGE VAN WYK

"The fallacies in reasoning along the line of the so-called "organized international community" with the object of establishing a contention that the Mandate instrument embodied an implied term such as aforestated, are legion. It disregards firstly the fact that, although the expression "organized international community" and the other expressions mentioned may in certain contexts serve some useful purpose as being descriptive of a collectivity of States, they have no legal significance whatever..... Furthermore, the reasoning in question either disregards the legal principle that a party cannot be bound by a suggested term to which it did not agree, or it disregards that fact that the Respondent agreed to the supervision of a particular body only, viz., the Council of the League..... It entirely disregards the important differences between

23 *South West Africa (second phase) Judgment, 1966*, at pp, 48-49.

the League and the United Nations, particularly the procedural provisions relating to the functioning of their organs...The truth is that the authors of the mandates system did not contemplate the possibility that the League would cease to constitute or represent what in a sense may be regarded as the "organized international community".....and the question whether the League's functions would be transferred to some future organization constituting or representing what could then be described as the "organized international community"...did therefore not arise....."[24]

And

".....The principle of effectiveness can never be divorced from the basic object of interpretation, viz., to find the true common intention of the parties, and it cannot operate to give an agreement a higher degree of efficiency than was intended by the parties. It cannot, therefore, be invoked to justify a result which is not in harmony with the intention of the parties as expressed by words used by them, read in the light of the surrounding circumstances and other evidence."[25]

And

".....Throughout its (1950) opinion the Court purported to be searching for the common intention of the parties to the Covenant, the Mandate and the Charter..... that "the international supervision" of the administration of the mandated territories should continue after the dissolution of the League...If the Court did not find such a common intention, the only alternative is that it must have decided to legislate, which would mean that it exceeds its authority....."[26]

24 *South West Africa (second phase) Judgment, 1966*, at pp. 88-89.
25 *Ibid.*, at p. 126.
26 *Ibid.*, at p. 128.