Dissenting opinion

JUDGE TANAKA

".....The question of supervision presupposes the *prima facie* continued existence of the Mandate. That is why this matter was dealt with in detail in the 1950 Advisory Opinion and discussed at length in the preliminary objections stage of the present cases in connection with the survival of Article 7, paragraph 2, of the Mandate, which is concerned with judicial supervision. Because we can, in the main, agree with what was decided by the Court in 1950 and 1962, we need not go into the details of the question."[27]

And

"The Mandates System is generally recognized as a product of compromise at the period of its inception between two principles, annexation and internationalization. The principle of international supervision by the League can be conceived as a product of compromise between the two extremes. So long as the Mandate survives, international supervision as a factor of compromise must be continued by some possible means to prevent the Mandate from being transformed into a kind of annexation."[28]

And

"Nevertheless, we cannot recognize universal succession in the juridical sense in those cases. Universal succession between the two entities, namely the League and the United Nations did not occur. Neither can the application of the provisions of the trusteeship system on

27 *South West Africa (second phase) Judgment, 1966*, at pp. 268-269.
28 *Ibid.*, at p. 273.

the Mandate be recognized without the conclusion of a trusteeship agreement. But nobody would wonder that the Mandatory's power once exercised on behalf of the League, from the necessity of circumstances, becomes exercised on behalf of the United Nations, and consequently the international supervisory power, once belonging to the League, now belongs to the United Nations. The acceptance of this power and with it the responsibility by the United Nations does not appear to constitute *ultra vires* because the matter concerning the tutelage of backward peoples without doubt lies within the scope and limit of the objectives of the United Nations."[29]

And

"Undoubtedly a Court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and difficult matter. Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their juridical activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the *raison d' etre* of a legal system, legal institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled.

"So far as the continuance of international supervision is concerned, the above-mentioned conclusion cannot be criticised as exceeding the function of the Court to interpret law. The Court's Opinion of 1950 on this question is not creating law simply for the reason of necessity or desirability without being founded in law and fact. The survival of the Mandates despite the dissolution of the

29 *South West Africa (second phase) Judgment, 1966*, at p. 274-275.

League, the importance of international supervision in the Mandates System, the appearance of the United Nations which, as the organized international community, it characterized by political and social homogenity with the defunct League of Nations, particularly in respect of the "sacred trust" for peoples who have not yet attained a full measure of self-government, and the establishment of the international trusteeship system, the Respondent's membership in the United Nations, and, finally, the refusal by the Respondent to conclude a trusteeship agreement as expected by the Charter : these factors, individually and as a whole, are enough to establish the continuation of international supervision by the United Nations."[30]

JUDGE PADILLA NERVO

"The necessity for supervision continues to exist. It cannot be admitted that the obligation to submit to supervision has disappeared, merely because the supervisory organ under the Mandates System has ceased to exist, when the United Nations has another international organ performing similar supervisory functions."[31]

And

"The new concept of the "sacred trust of civilization" creates a new sense of international responsibility, which requires consultation with the peoples of the mandated territories and with the appropriate international organs, and to take into account their will and consent as a *sine qua non* condition for effecting changes in the status of such territories."[32]

Comments

Judge Tanaka was of the view that "the question of supervision presupposes the *prima facie* continued existence of the

30 *South West Africa (second phase) Judgment, 1966,* at p. 277.
31 *Ibid.*, at p. 459.
32 *Ibid.*, at p. 465.

Mandate" and that the latter question was dealt with at length by the Court in its 1950 Advisory Opinion and 1962 Judgment. Judge van Wyk pointed out that the authors of the Mandates System did not foresee situation resulting from the dissolution of the League and, therefore, did not provide for the same. He expressed the view that in its 1950 Advisory Opinion the Court resorted to legislation, (which is not its function), after having failed to discover a common intention of the parties to the Covenant, the Mandate and the Charter, to the effect that the international supervision over mandates should continue after dissolution of the League. According to him, "the intention of the parties as expressed by words used by them, read in the light of the surrounding circumstances and other evidence" should be the guiding factors. The Court, in its 1966 Judgment, also expressed the view that it is not open to the Court to supply "an omission resulting from the failure of those concerned to foresee what might happen", or to presume that the authors of the System could have intended a particular course of action.

On the other hand, Judge Tanaka, while agreeing that the Court's function is to declare "the law" and not to legislate, expressed the view that it was difficult to draw a borderline between them, and that "the possibility of some degree of the creative element" in the juridical activities of the judges cannot be denied. According to him, the judges could not be permitted "to establish law independently of an existing system, institution or norm." But they are always permitted to draw inferences from "the *raison d' detre*" of such system, institution or norm and, if nesssary, also to fill the lacunae in the intent of legislation or parties" in this manner. Judge Tanaka also expressed the view that principle of international supervision was a product of compromise between annexation and internationalization of the territory concerned and that it becomes necessary to continue this compromise as long as the purpose of the Mandate is not achieved. Without such supervision, annexation of the mandated territory would occur.

Judge Padilla Nervo was of the view that the concept of "sacred trust of civilization" had given birth to "international responsibility which requires consultation with the peoples of the mandated territories and with the appropriate international organs", and that the necessity for international supervision continued to exist. The Court, in its 1950 Advisory Opinion, had also expressed a similar view commenting upon the said opinion. Judge Tanaka said that the Court did not create law "simply for the reason of necessity or desirability without being founded in law and fact." According to him, continuation of international supervision is established by many factors, such as survival of Mandate on dissolution of the League; the fact that international supervision plays an important role in the Mandates System; the appearance of the United Nations, the "organized international community" similar to the League in political and social objectives, "particularly in respect of the "sacred trust" for peoples who have not yet attained a full measure of self-government"; the U.N. Trusteeship System; South Africa's membership in the United Nations; and its refusal "to conclude a trusteeship as expected by the Charter".

On the other hand, Judge van Wyk denied that the Mandate instrument embodied an implied term or concept like the "organized international community" and expressed the view that the concept has no legal significance irrespective of its usefulness in describing "a collectivity of States". He emphasized that the object of interpretation was to find the true common intention of the parties", and that the principle of effectiveness "cannot operate to give an agreement a higher degree of efficiency than was intended by the parties". Judge van Wyk favoured the principle of "literal interpretation".

On the question of the League's functions *vis-a-vis* the Mandates passing on to the United Nations, Judge Tanaka was of the view that, even though universal succession between the League and the United Nations did not take place, "the Mandatory's power once exercised on behalf of the League,

from the necessity of circumstances, becomes exercised on behalf of the United Nations." This is not in any event *"ultra vires* because the matter concerning the tutelage of backward peoples without doubt lies within the scope and limit of the objections of the United Nations." In this connection Judge Jessup, in his dissenting opinion to the 1966 Judgment, quoted from a memorandum prepared by the Secretariat of the United Nations in 1950 at the request of the Economic and Social Council on the question of the then legal status of the regime established by and under the League for the protection of minorities. The relevant quotation runs as follows :

> "It is true, as has been stated above (P. 11) that the United Nations is not legally the successor of the League of Nations. . . . Nevertheless, the United Nations, like the League of Nations, is the representative organ of the international community, and in this capacity is naturally called upon to assume the functions exercised by the League of Nations *vis-a-vis* States which had entered into obligations towards organs of the League of Nations." (P. 14) [33]

However, Judge van Wyk pointed out "that South Africa had never agreed to substitution of the United Nations for the League." [34] He also emphasized "the important differences between the League and the United Nations, particularly the procedural provisions relating to the functioning of their organs." On the other hand, the Court, in its 1950 Advisory Opinion, and Judge Tanaka and Judge Padilla Nervo, in their dissenting opinions to the 1966 Judgment emphasized the fact that the United Nations has another international organ performing similar, though not identical, supervisory functions." Judge Tanaka also expressed the view that "the international supervisory power, once belonging to the League, now belongs to the United Nations."

---

33 *South West Africa* (*second phase*) *Judgment 1966*, at p. 420.

34 According to Justice M. Hidayatullah of the Supreme Court of India: See his book on *The South West Africa Case* at p. 45.

4. The controversy examined in the light of original terms of the Mandate

1966 Judgment

Separate opinion

JUDGE VAN WYK

"Moreover, such an implied term would go beyond the declared scope and object of the instruments in question. It is true that the general object of the parties was that the principle should be applied "that the well-being and development" of the peoples of South West Africa "should form a sacred trust of civilization" ; but their object was also that this purpose should be achieved in a particular manner, i. e., within the framework of Article 22 of the Covenant. The object was, in a sense, to define the international status of South West Africa, to create an international regime ; but an integral part of the definition of the regime, was supervision by the Council of the League. This appears clear not only from the very provisions of Article 22 of the Covenant, but also from the *travaux preparatoires*, which reveal that the general provisions would not have been agreed to had the Article not contained the specific provisions relating to the methods devised to give practical effect thereto. . . . " [35]

And

"It is significant that no State which was a party to the Covenant of the League - or any other State for that matter - at any material time alleged that the Mandate instrument must be interpreted as embodying an implied term to the effect that Respondent would upon the dissolution of the League become obliged to report and account to another body, such as, for example, the General Assembly of the United Nations. . . . .

35 *South West Africa (second phase) Judgment, 1966,* at p. 86.

"A finding that the functions of the Council of the League, under the Mandate Declaration, as read with Article 22 of the Covenant of the League, became vested in the organs of the United Nations by virtue of an implied provision in the said instruments would go beyond their declared scope and object, would involve radical changes thereto, and would not only do violence to their clear and express language but would amount to a total disregard of the evidence relating to the common intention of the parties. Such a finding would impose an obligation on the Respondent to which it did not agree, and to which it would not have agreed had it been asked to do so. It would constitute legislation by the Court disguised as interpretation. No Court, including this Court, has the power to make a party's obligations different from, or more onerous than, those to which he has consented. . . . . " [36]

And

" ..... an examination of the discussions and recommendations of the Preparatory Commission reveals that its members ..... were not under the impression that the Covenant of the League, or the Mandate Declarations, or the Charter of the United Nations, or any other instrument, had the effect of transferring the functions of the Council of the League relative to the Mandates to any of the organs of the United Nations. The examination further reveals that Respondent did not, by conduct or otherwise, agree to such a substitution." [37]

Dissenting opinions

JUDGE WELLINGTON KOO

"One of the two principles is, in the words of Article 22, paragraph 1, of the Covenant, "the principle

36 *South West Africa (second phase) Judgment, 1966,* at pp. 90-91.

37 *Ibid.*, at p. 96.

that the well-being and development of such peoples form a sacred trust of civilization" ..... Whatever power and authority the Mandatory possesses under the Mandate are clearly not conferred to serve his own ends or to enure to its own benefit or advantage, but solely for the purpose of enabling it to fulfil its obligations....." [38]

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..... 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 the application of the provisions of a given Mandate.

"These obligations constitute a fundamental feature of the Mandates System. The dissolution of the League of Nations and the disappearance of the Council and the Permanent Court did not terminate them..... 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 unanimously

38 *South West Africa (second phase) Judgment, 1966.* at p. 233.

adopted by the Assembly of the League of Nations at its last meeting on 18th April 1946, including the concurrence of the Respondent." [39]

JUDGE TANAKA

"From a purely contractual and individualistic viewpoint the Mandate would be a personal relationship between the two parties, the existence of which depends upon the continuation of the same parties. For instance, a Mandate contract in private lapses by reason of the death of the mandator. But the international Mandate does not remain, as we have seen above, purely a relationship, but an objective institution, in which several kinds of interests and values are incorporated and which maintains independent existence against third parties. The Mandate, as an institution, being deprived of personal character, must be placed outside of the free disposal of the original party because its content includes a humanitarian value, namely the promotion of the material and moral well-being of the inhabitants of the territories..." [40]

And

"The Respondent, while denying its obligations to submit to supervision, insists on preserving its rights or authority to administer the Territory. It seems that the Respondent recognizes the severability of its rights from its obligations, an attitude which is not in confirmity with the spirit of the Mandates System." [41]

Comments

According to Judge van Wyk there was no implied term in the Covenant or the Mandate to the effect that the United

39 *South West Africa (second phase) Judgment, 1966,* at p. 235.

40 *Ibid.*, at p. 268.

41 *Ibid.*, at p. 273.

Nations would step into the League's shoes in relation to affairs of Mandates after the demise of the League. According to him, such an implied term "would go beyond the declared scope and object of the instruments in question", "and would not only do violence to their clear and express language but would amount to a total disregard of the evidence relating to the common intention of the parties." He also pointed out that no State at any material time alleged the existence of such an implied term ; that the members of the Preparatory Commission (established to formulate recommendations regarding transfer of certain functions from the League to the United Nations also did not think that there was any such implied term in the Covenant, or the Mandates ; and that to imply such a term would constitute an act of legislation on the part of the Court (See Annexure IV to this Study). Judge Tanaka characterized this as a purely contractual and individualistic viewpoint, and expressed the view that the Mandate was not "purely a relationship, but an objective institution, in which several kinds of interests and values are incorporated and which maintains an independent existence." As such, it becomes necessary to place the Mandate "outside of the free disposal of the original parties."

Judge van Wyk himself admitted that the general object of the parties was that the principle should be applied "that the well-being and development" of the peoples of South West Africa "should form a sacred trust of civilization", but their object was also that this purpose should be achieved in a particular manner, i.e., within the frame work of Article 22 of the Covenant." As regards the latter viewpoint, one may ask : If it becomes impossible to realize the general object in the given manner, does it mean that the general object should not be realized at all ? Obviously, in such a situation the duty would be to realize the said object in a manner which is similar, though not identical to the same, rather than to let the same remain unrealised. The object is certainly more important than the structure, and certainly there should not be any objection to using an available structure which is similar to the one which

was stipulated originally, but which disappeared. Judge Tanaka also emphasized that the content of the Mandates System "includes a humanitarian value, namely the promotion of the material and moral well-being of the inhabitants of the territories."

Judge Wellington Koo pointed out two cardinal principles of the Mandates System, namely (i) the principle of "well-being and development" of the inhabitants of the territory as embodied in Article 22(1) of the Covenant, and (ii) the principle of international accountability as embodied in paragraphs 7, 8 and 9 of Article 22 of the Covenant and Articles 6 and 7 of the Mandate (See Annexures I and II to this Study). According to him, these obligations of the Mandatory constitute a fundamental feature of the Mandates System" and were not terminated by the dissolution of the League. Moreover, whatever powers were given to the Mandatory were for the purposes of the first principle, and the second principle works as a security of the "sacred trust". Further, international accountability, as provided under the Covenant and Mandates remained intact "by virtue of the principle of severability under international law." Judge Tanaka expressed the view that the rights and powers of the Mandatory could survive only alongside with the obligations, and not independently of them, and that the principle of severability cannot be utilised by the Respondent to claim that his powers under the Mandate remained, while the obligations disappeared alongwith the League.

According to Judge van Wyk, the Mandatory could not be subjected to more onerous obligations than those incumbent upon it under the Covenant. Can it be said that a supervision by the United Nations of the "sacred trust" would result in more onerous obligations upon the Mandatory ? Judge van Wyk's observation seems to be highly doubtful.

5. The controversy examined in the light of events immediately preceeding dissolution of the League

1962 Judgment

"It is clear from the foregoing account that there was a unanimous agreement among all the Member States

present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the meeting, "will necessarily preclude complete compliance with the letter of the Mandate," i.e. notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the mandates, however, imperfect the whole system would be after the League's dissolution, and as much as it would be operable, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates."[42]

Dissenting opinion

SIR PERCY SPENDER AND SIR GERALD FITZMAURICE

"The contrast between the original Chinese draft and the one eventually adopted constitutes an additional reason why we find it impossible to accept the view... that the functions of the League Council in respect of Mandates had passed to the United Nations, for this was the very thing which the original Chinese draft proposed but was not adopted."

1966 Judgment

Separate Opinion

JUDGE VAN WYK

"If the purpose of the final League resolution was to record, or to incorporate, an agreement in terms of which

42 *South West Africa Case, Preliminary Objections, Judgment:* I.C.J. Reports 1962, at p. 341.

the Mandatories were to submit annual reports to the United Nations, and to submit to the supervision of the United Nations, the provisions of the original Chinese draft would have been retained as expressing the intention of the parties. The fact that the express provisions in the first draft were deleted, can in the circumstances lead to no other conclusion than that no agreement embodying such provisions was arrived at. Any suggestion that the parties deliberately refrained from retaining the express provisions of the original Chinese draft because they preferred a tacit agreement to an express one in regard to this important matter would be so nonsensical as not to merit any consideration. The omission of the said provisions in the later draft and in the resolution constitutes conclusive proof that that meeting of minds which was necessary to bring about an agreement concerning the transfer to the United Nations of supervisory powers in respect of Mandates was lacking."[44]

And

"The Board of Liquidation of the League (which consisted of representatives of nine ex-members of the League) were required by the League on its dissolution "to have regard in the performance of its task to all the relevant decisions of the League Assembly taken at its last session." The Board evidently did not regard the aforesaid resolution of 18 April 1946 as embodying international agreements transferring the supervisory functions of the League to the United Nations....."[45]

And

".... But even if the resolution can at all be regarded as being in the nature of a treaty, it cannot have the effects aforestated. It cannot embody more than the expressed

44 *South West Africa Cases (second phase) Judgment. 1966*, at p. 112.
45 *Ibid.*, at p. 113.

intention of the parties. At most it would (on the assumption that it is a treaty) constitute an agreement that the Mandatories would continue to administer the territories for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates. The aforesaid resolution does not refer to any undertaking to continue to report and account. As I have indicated this omission was not accidental but deliberate."[46]

And

"However, be that as it may, it should be remembered that the resolution by itself has no legal significance : it is a recommendation to the Government (i.e. the Mandatory) and not an act of utterance by the Government....."[47]

Dissenting opinions

JUDGE WELLINGTON KOO

"...For by paragraph 3 of the above-cited resolution, the Respondent, like the other Mandatory Powers and remaining Members of the League, recognized the correspondence to each other of the principles of the trusteeship system and the Mandates System and by paragraph 4 it undertook to make an arrangement with the United Nations by mutual agreement relating to the Mandate for South West Africa."[48]

JUDGE PADILLA NERVO

"The resolution of the League's Assembly of 18 April 1946 had to recognize that the functions of the League terminated with its existence, at the same time the

46 *South West Africa (second phase) Judgment, 1966,* at p. 115.

47 *Ibid.*, at p. 121.

48 *Ibid.*, at p. 237.

Assembly recognized that Chapters XI, XII and XIII of the Charter embodied the principles declared in Article 22 of the Covenant of the League of Nations.

"In paragraph 4 of that resolution, the Mandatory Powers recognised that some time would lapse from the termination of the League to the implementation of the trusteeship system, and assumed the obligation to continue nevertheless, in the meantime, to administer the territories under Mandate, for the well-being of the peoples concerned, until other arrangements have been agreed between them and the United Nations.

"The Assembly understood that the Mandates were to continue in existence until "other arrangements" were established, concerning the future status of the territory.

"Maintaining the "*status quo*" meant , to administer the territory as a sacred trust and to give account and report on the acts of administration.

"These are decisive reasons for an affirmative answer to the question whether the supervisory functions of the League are to be exercised by the new international organization created by the Charter."[49]

And

"The resolution of 18 April 1946 of the Assembly of the League presupposes that the supervisory functions exercised by the League would be taken over by the United Nations, and the General Assembly has the competence derived from the provisions of Article 10 of the Charter, and is legally qualified to exercise such supervisory functions."[50]

JUDGE JESSUP

"It is not surprising that Counsel for Respondent should hit upon the contrast between these two resolutions

49 *South West Africa (second phase) Judgment, 1966,* at p. 459.

50 *Ibid.*, at p. 460.

to support the argument that the rejection of the original Chinese resolution proved that the United Nations did not agree that it had any responsibilities in regard to the Mandatory regime which had functioned under the League of Nations. However, as anyone familiar with proceedings in the United Nations would know, it is always dangerous to draw inferences from the fact that a particular resolution is not adopted or its sponsor withdraws it. Many reasons may enter into the unwillingness of delegations to vote for a particular proposition which may have been introduced as a *ballon d' essai*, or for other reasons..... "[51]

Comments

On April 9, 1946, the Respondent made the following statement at the final plenary meeting of the League Assembly :

> "It is the intention of the Union Government at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South West Africa a status under which it would be internationally recognised as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the Mandate as an integral part of the Union. In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.
>
> "The disappearance of those organs of the League concerned with the supervision of Mandates, primarily the Mandates Commission and the League Council, with necessarily preclude complete compliance with

51 *South West Africa (second phase) Judgment, 1966,* at p. 348.

the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory." (See Annexure V to this Study).

The Court, in its 1962 Judgment, held that inspite of the fact that complete compliance with the Mandate is not possible on account of dissolution of the Mandate, as also alleged by Respondent in the aforesaid statement, "there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined." The alleged agreement was contained in the resolution of the League Assembly (dated 18 April 1946), which provided as follows :

"The Assembly :

Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization.

1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the Mandates System and in particular pays tribute to the work accomplished by the Mandates Commission ;

2. Recalls the role of the League in assisting Iraq to progress from its status under 'A' Mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the

Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community ;

3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League ;

4. Takes note of the expressed intentions of the members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates until other arrangements have been agreed upon between the United Nations and the respective Mandatory powers." (See Annexure VI to this Study).

According to the 1962 Judgment, the common understanding of the League Members in passing the said resolution "was to continue the Mandates, however imperfect the whole system would be after the League's dissolution, and as much as it would be operable" until alternative arrangements with the United Nations are concluded. On the other hand, Judge van Wyk, in his separate opinion to the 1966 Judgment, pointed out that the Board of Liquidation of the League did not regard the said resolution "as embodying international agreements transferring the supervisory functions of the League to the United Nations," and that it was merely a recommendation by the League to the Mandatory and did not constitute an obligation assumed by the latter. (The resolution was passed unanimously by the League Assembly and with the affirmative vote of the Respondent, and it referred to the aforesaid statement by the Respondent). According to him, even if the resolution is regarded to

be a treaty, it would at best cast an obligation on the Mandatory to continue to administer the territory for the well-being and development of the inhabitants of the territory in accordance with the obligations under the Mandate. He expressed the view that the resolution certainly did not cast an obligation upon the Mandatory to report and account to anybody and that the omission in this respect was "not accidental but deliberate."

Judge Wellington Koo and Judge Padilla Nervo did not agree with Judge Wyk's views. They pointed out that in paragraph 3 of the resolution, the similarity between the principles of the Mandates and Trusteeship systems is recognised, and that paragraph 4 refers to an express undertaking of the Mandatory to continue to administer the territory in accordance with the obligations under Mandates, until alternative arrangements with the United Nations were completed (See Annexures I and II to this Study). Judge Padilla Nervo also expressed the view that "maintaining the "*status quo*" meant to administer the territory as a sacred trust and to give account and report on the acts of administration", and that this established that the supervisory functions were to be exercised by the United Nations whose Charter embodied principles similar to those of the Mandates System.

The above-mentioned resolution was adopted after the two Chinese drafts had been considered by the Assembly and after the first Chinese draft was withdrawn. The first draft read as follows :

"The Assembly,

Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories under trusteeship;

Considering that the League's function of supervising mandated territories should be transferred to the United