they contend should be distilled from the general principles of law recognized by civilized nations..... It certainly does not mean that by legislating on particular domestic matters a majority of civilized nations could compel a minority to introduce similar legislation. .....In any event, the evidence of Professor Possony, Professor Van den Haag and Professor Manning proves that such a rule is not universally observed, and that laws and official practices to the contrary exist in a large number of States, including the Applicants'. The fact that neither of the Applicant States observes this alleged norm or standards in their respective countries indeed reveals the artificiality of their cases.

"Although the Applicants also purported to rely on the provision of Article 38 (1) (d) as a source of their norm, they did not refer to a single judgment, opinion or author confirming the existence thereof".[25]

Dissenting opinions

JUDGE TANAKA

"...the alleged norm of non-discrimination and non-separation, being based on the United Nations Charter, particularly Articles 55(c), 56, and on numerous resolutions and declarations of the General Assembly and other organs of the United Nations, and owing to its nature as a general principle, can be regarded as a source of international law according to the provisions of Article 38, paragraph 1 (a)-(c). In this case three kinds of sources are cumulatively functioning to defend the above-mentioned norm : (a) international convention, (2) international custom and (3) the general principles of law".[26]

25 *Ibid.*, at p. 170.

26 *Ibid.*, at p. 300.

And

"To sum up, the principle of the protection of human rights has received recognition as a legal norm under three main sources of international law, namly, (1) international conventions, (2) international custom and (3) the general principles of law. Now, the principles of equality before the law or equal protection by the law presents itself as a kind of human rights norm. Therefore, what has been said on human rights in general can be applied to the principle of equality. (Cf. Wilfred Jenks, *The Common Law of Mankind*, 1958, p. 121. The author recognizes the principle of respect for human rights including equality before the law as a general principle of law.)"[27]

And

"We consider that the principle of equality, although it is not expressly mentioned in the mandate instrument constitutes, by its nature, an integral part of the mandates system and therefore is embodied in the Mandate. From the natural law character of this principle its inclusion in the Mandate must be justified".[28]

JUDGE JESSUP

"...It has also been plainly stated herein that my conclusion does not rest upon the thesis that resolutions of the General Assembly have a general legislative character and by themselves create new rules of law. But the accumulation of *aparthied* as reproduced in the pleadings of Applicants in this case, especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard...It is equally true that

27 *Ibid.*, at p. 300.

28 *Ibid.*, at p. 301.

obtaining the disagreement, the condemnation of the United Nations, is of decisive practical and juridical value in determining the applicable standard. This Court is bound to take account of such a consensus as providing the standard to be used in the interpretation of Article 2 of the Mandate....."[29]

JUDGE PADILLA NERVO

The Court cannot be indifferent to the fact that the Mandate operates under the conditions and circumstances of 1966, when the moral and legal conscience of the world, and the acts, decisions and attitudes of the organized international community, have created principles, and evolved rules of law which in 1920 were not so developed, or did not have such strong claims to recognition. The Court cannot ignore that "the principle of non-discrimination has been recognized internationally in most solemn form" (Jenks).

"Since far away years of the drafting of the Mandate, the international community has enacted important instruments which the Court, of course, must keep in mind, the Charter of the United Nations, the Constitution of the International Labour Organization, the Universal Declaration of Human Rights, the Declaration on Elimination of All Forms of Racial Discrimination, and numerous resolutions of the General Assembly and the Security Council, having all a bearing on the present case for the interpretation and application of the provisions of the Mandate. All these instruments confirm the obligation to promote respect for human rights".[30]

Comments

Judge van Wyk pointed out that the Applicants used both the terms "norm" and" standards", as having identical content and meaning, the "legally enforceable rules".

29 *Ibid.*, at p. 441.

30 *Ibid.*, at pp. 467 and 468.

"The sole difference between the two concepts was that standards were said to be binding only on Respondent as Mandatory, whereas the norms was said to be binding on all States, including Respondent in its capacity as a sovereign State".

According to Judge Tanaka, the international norm of non-discrimination was based upon the United Nations Charter, resolutions of the United Nations General Assembly and other organs thereof, and the general principles of law recognized by civilized nations, and under the provisions of Article 38, para. 1 (a)-(c) they became a source of international law under three heads, viz., international conventions, international custom and the general principles of law. Judge Padilla Nervo referred to the United Nations Charter and the Constitution of the International Labour Organization which gave rise to conventional international norm of non-discrimination, the United Nations Declaration on Elimination of all forms of Racial Discrimination, the Universal Declaration of Human Rights, and various other resolutions of the General Assembly and the Security Council of the United Nations, which gave rise to the customary norm of non-discrimination.

On the other hand, Judge van Wyk did not consider the norm of non-discrimination to be a source of international law under any of the aforesaid heads. He expressed the view that the United Nations Charter and the Constitution of the International Labour Organisation cannot be interpreted to legally recognize the said norm, inasmuch as the United Nations organs or the International Labour Organisation lacked power to lay down such a norm or rule by way of "interpretation", that the resolutions of the United Nations, referred to above, did not "satisfy the traditional tests applied by this Court in determining the existence or otherwise of "international custom", and did not constitute a State practice, but remained mere criticisms of the Respondent's policies, and that the said norm could hardly be recognised to be a general principle of

law recognized by civilized nations inasmuch as a large number of States, including the Applicants, have laws and official policies contrary to the said norm.

Judge Tanaka pointed out that the principle of equality before the law or equal protection of laws, as a human rights rom, had been recognized under three sources of international law, namely international conventions, international custom, and the general principles of law, and that "the principle of equality, although it is not expressly mentioned in the mandate instruments, constitutes, by its nature, an integral part of the mandates system, and therefore is embodied in the Mandate. From the natural law character of this principle, its inclusion in the Mandate must be justified". Judge van Wyk did not agree with the suggestion that the Mandate had been amended to include the said norm, inasmuch as the former could not be amended without the consent of the Respondent, who, in fact, always resisted any such amendment thereof as imposed the obligation to observe the said norm upon the Respondent. Judge van Wyk also regarded as "completely unsound" the Applicants' contention to the effect that the standards for non-discrimination were binding upon the Respondent by reason of an implied agreement in the Mandate itself, in terms of which the Mandatory was bound to submit to standards laid down by the supervisory authority".

Judge Padilla Nervo, on the other hand, emphasized the evolving character of the legal norms, which came into being after the inception of the Mandates System. He pointed out that by 1966, "the moral and legal conscience of the world, and the acts, decisions and attitudes of the organized international community, have created" many such norms, including the norm of non-discrimination. According to him, the said norm, as incorporated in various international conventions and United Nations resolutions, which confirm the obligation to promote respect for human rights", has "a bearing on the present case for the interpretation and application of the

provisions of the Mandate". Judge Jessup regarded the repeated condemnation of the Respondent's *aparthied* policy by the United Nations as "proof of the pertinent contemporary international community standard", and as "of decisive practical and juridical value in determining the applicable standard", which the Court was bound to take into account in interpreting Article 2 of the Mandate, inasmuch as the said standard was based on a consensus of the international community. In this connection, Richard A. Falk has remarked that "Judge Jessup's reliance on standards imported in the Mandate context as guides to interpretation is not convincing on this issue of balancing Article 2 (2) against 2 (1). No State, and *a fortiori* no State in the role of Mandatory, has the discretion to violate rules of international law. Therefore, however wide the discretion of the Mandatory is conceived to be, it must, as a minimum condition, administer the mandated territory, in conformity with applicable rules of international law. Judge Tanaka's rationale has the important side effect of making illegal the practice of *aparthied* anywhere, including South Africa".[31] He commends Judge Tanaka's thesis regarding generation of customary international law, which was in the stage of transformation from a sovereignty-centered international system (operating through conventions) to a community-centered international system (operating through resolutions and acts of international organizations like the United Nations).

5. Respondent's policy of *aparthied*

1966 Judgment

Separate opinion

JUDGE VAN WYK

"An improper purpose or motive may be proved in a number of ways, such as by direct statements of the

31 In his article on "The South West Africa Cases". See *International Ooganization*, Vol. XXI, No. 1, Winter, 1967, at p. 22.

person concerned. However, a more frequent source of proof is circumstantial evidence, including the nature of the act itself. If an act is so unreasonable that no reasonable person placed in the position of the holder of the power would have performed it, one may deduce that such act was motivated by some improper motive or consideration. Of course, such a conclusion can only be arrived at after considering all relevant facts including the purported purposes and effects of the act in question".[32]

And

"(a) If it was intended that differentiation on the basis of membership of a group, class or race should be prohibited, express language to that effect would have been used in the Mandate.

"(b) The very contrary is the position-the Mandate expressly authorizes differentiation on the said basis in the provisions relating to military training and the supply of intoxicating spirits and beverages.

"(c) The Mandate furthermore authorized the application of Respondent's existing laws to the Territory. It was generally known at the time that policies of differentiation were applied in the Union of South Africa, substantially similar to those employed in the Territory.

"(d) Policies of differentiation were being applied when the Mandate came into force in comparable territories by several of the more important members of the League.

"(e) The conduct of all the parties to the Mandate at all material times reveals that there was general acquiescence in the policy of differentiation.

32 *South West Africa (second phase) Judgment, 1966*, at p. 152.

"(i) Practically all the specific policies objected to in the Memorials were applied in South West Africa during the lifetime of the League. Many of these policies were expressly approved by the League organs. At no time was any objection made on the grounds of a norm or standards as now contended for by the Applicants.

"(ii) Policies of differentiation (many af them similar to those applied by the Respondent) were applied throughout the lifetime of the League by other mandatories. No objection was raised on the grounds now advanced by the Applicants.

"(f) ws will be shown, the undisputed statements in Respondent's pleadings and the uncontradicted evidence of the expert witnesses strongly support the policy of differentiation : these witnesses all agree that, if the alleged norm or standards were to be applied, the promotion of well-being and social progress would not be advanced. This underlines the unlikelihood that the Mandate would at its inception have included such implied provisions, and shows that the subsequent incorporation thereof into the Mandate would have constituted a material amendment thereof".[33]

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 Respandent'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

33 *Ibid.*, at pp. 156 and 157.

that in basic and important respects they were actually approved of . . . . . "[34]

And

"It seems obvious that it must have been realized by all concerned that in determining its policies relating to the administration of the Territory the Respondent would have due regard to the realities of the situation. These realities include the existence of the four distinct northern territories and peoples. The Respondent did not create these separate homelands, or the distinct nationalities living in them; they were there at all material times. In regard to the Police Zone the realities included the facts that the tribal economies of the Native peoples had been shattered, but that the Natives, undeveloped and illiterate, lacked the skills required for modern economic and administrative activities. They included also the under-populated state of the Police Zone, and the existence of the European population and the struggling modern economy established by it. The Territory, vast, mostly underdeveloped, and poor, needed White leadership and initiative.

"White immigrants were needed to maintain law and order, to manage and administer the mines, railways, harbours, hospitals and the civil service. Moreover, additional sources of income were desperately needed, and at that time the only practical way in which this could be obtained was through the introduction of more White capital, initiative and enterpreneurial skill. In particular the skill and initiative of progressive farmers was badly needed. The only role the Natives could initially play in the money economy was by providing unskilled labour.

34 *Ibid.*, at p. 164.

"Policies of differentiation such as, e. g., separate schools, separate residential areas, reserves for the different ethnic groups, influx control, etc., were being applied by the Respondent in the Territory at the time the Mandate came into existence. The vast differences between the different groups made this both natural and inevitable".[35]

Dissenting opinions

JUDGE WELLINGTON KOO

"From the undisputed facts presented in the written and oral pleadings of the Parties and in the testimony and cross-examination of the witnesses and experts before the Court, it appears that this policy, as constituted by the said laws, regulations and measures applied or applicable to South West Africa, consecrates an unjustifiable principle of discrimination based on grounds of race, colour or ethnic origin in establishing the rights and duties of the inhabitants of the Territory. It is applied to the life, work, travel and residence of a non-White or a Native in the Territory. It is enforced in matters relating, for example, to the ownership of land in the so-called Police Zone, mining and the mining industry, employment in the Railways and Harbour Administration, vocational training and education.

"Quite apart from considerations of an international norm or standard of non-discrimination in general international law of today or in the particular sphere of the trusteeship system of the United Nations, such discrimination as practised by the Mandatory was consistently criticized and deprecated even in the days of the Permanent Mandates Commission of the League of Nations."[36]

35 *Ibid.*, at p. 176.

36 *Ibid.*, at pp. 233 and 234.

And

"The record thus shows that the policy of *aparthied* or separate development, as pursued in South West Africa, as far as the non-White groups are concerned, has not been and is not compatible with the basic principle of the "sacred trust of civilization" or with the Respondent's obligation under Article 2 of the Mandate....."[37]

JUDGE TANAKA

"Firstly, we shall deal with the concept of *aparthied*. The Applicants, in defining *aparthied*, said : "Respondent .....has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory".

".....the Respondent has never denied its practice of *aparthied*, but it wants to establish the legality and reasonableness of this policy under the mandates system and its compatibility with the obligations of the Respondent as Mandatory, as well as its necessity to perform these obligations".[38]

And

"From the view point of the Applicants, the existence, and objective validity, of a norm of non-discrimination make the question of intention or motivation irrelevant for the purposes of determining whether there has been a violation of this norm. The principle that a legal precept as opposed to a moral one, insofor as it is not spefically provided otherwise, shall be applied objectively independently of motivation on the part of those concerned and independently of other individual circumstances, may be applicable to the Respondent's defence of *bona fides*".[39]

37 *Ibid.*, at p. 235.
38 *Ibid.*, at p. 285.

And

"...The Respondent insists that each population group developing its own characteristics and individuality, to attain self-development, separate development should be the best way to realize the well-being and social progress of the inhabitants. The other alternative, namely the mixed integral society in the sense of Western democracy would necessarily lead to competition, friction, struggle, chaos, bloodshed, and dictatorship as examples may be found in some other African countries....."[40]

And

"Discrimination according to the criterion of "race, colour, national or tribal origin" in establishing the rights and duties of the inhabitants of the territory is not considered reasonable and just. Race, colour, etc., do not constitute in themselves factors which can influence the rights and duties of the inhabitants as in the case of sex, age, language, religion, etc. If differentiation be required, it would be derived from the difference of language, religion, custom, etc., not from the racial difference itself. In the policy of *aparthied* the necessary logical and material link between difference itself and different treatment, which can justify such treatment in the case of sex, minorities, etc., does not exist."[41]

JUDGE JESSUP

"...the Court has not decided that the Applicants are in error in asserting that the Mandatory, the Republic

39 *Ibid.*, at p. 287.
40 *Ibid.*, at pp. 303 and 304.
41 *Ibid.*, at p. 314.

of South Africa, has violated its obligations as stated in the Mandate and in Article 22 of the Covenant of the League of Nations. In other words, the charges by the Applicants of breaches of the sacred trust which the Mandate imposed on South Africa are not judicially refuted or rejected by the Court's decision".[42]

And

"...since 1946 public attention has often focussed on the violence with which Members of the United Nations have condemned policies and practices of other Members in areas outside as well as inside the continent of Africa".[43]

JUDGE PADILLA NERVO

"The assertion that *aparthied* is the only alternative to chaos, and that the peoples of South West Africa are capable of constituting a political unity and be governed as a single State does not justify the official policy of discrimination based on race, colour or membership in a tribal group".[44]

JUDGE FORSTER

"If the Court had only consented to take its examination on the merits a little further, it would have found the multiplicity of impediments put in the way of coloured peoples in all fields of social life. Barriers abound : in admission to employment, in access to vocational training, in conditions placed on residence and freedom of movement; even in religious worship and at the moment of holy communion.

"Creating obstacles and multiplying barriers is not, in my view, a way to contribute to the promotion of "the

42 *Ibid.*, at p. 331.
43 *Ibid.*, at p. 416.
44 *Ibid.*, at p. 467.

material and moral well-being and the social progress of the inhabitants of the territory". It is, on the contrary, a manifest breach of the second paragraph of Article 2 of the Mandate".[45]

Comments

It has been pointed out by Judge Jessup that the Court, in its 1966 Judgment, did not reject or refute the Applicants' charges of breaches by the Respondent of its obligations under the Mandate and Article 22 of the Covenant. Had the Court gone into the merits of the case, it according to Judge Forster, would have discovered the barriers of various sorts placed by the Respondent in the social life of the non-Whites through its policies of *aparthied* in the fields of admission to employment, vocational training, residence, freedom of movement and practice of religion.

The Applicants defined "*aparthied*" at P. 108 of the Memorials in the following terms :

> "Under *aparthied*, the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, colour and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the peoples to the preferences of a minority...It deals with *aparthied* in practice, as it actually is and as it actually has been in the life of the people of the Territory..."

The Applicants also said: "Respondent...has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory".

Judge van Wyk dealt with the question of motive and said that motive could be proved by the direct statements of

45 *Ibid.*, at pp. 482 and 483.

the persons concerned as also by the circumstantial evidence. He also expressed the view that if "an act is so unreasonable that no reasonable person placed in the position of the holder of the power would have performed it, one may deduce that such act was motivated by some improper motive or consideration". In this respect, Judge Tanaka pointed out that the question of motivation or intention became irrelevant from the Applicants' point of view, insofar as violation of the norm of non-discrimination, which they alleged, was concerned. Since, the said norm was to be applied objectively, independently ro the Respondent's motivation and other individual circumstances the Respondent's defence of *bona fides* became totally unnecessary. We may note here that the Respondent did not deny the practice of *aparthied*, but defended the same as *bona fide* exercise of discretion vested in it, and justified the same as reasonable, necessary, and legally valid.

Judge van Wyk supported the above mentioned contention of the Respondent and expressed the view that the Mandate contained no provision expressly prohibiting a policy of differentiation "on the basis of membership of a group". On the other hand, according to him, the Mandate authorized such differentiation in its provisions relating to military training and the supply of intoxicating spirits and beverages; as also it authorized the application of the Respondent's existing laws (which include laws relating to *aparthied*) to South West Africa. He also criticized the view that the Mandate originally incof porated, or could be interpreted to incorporate subsequently the norm of non-discrimination, inasmuch as the application of the said norm, according to the uncontradicted testimony of expert witnesses, would not have advanced, but hampered, the well-being and progress of inhabitants of the territory. On the other hand, Judge Wellington Koo and Judge Forster expressed the view that the policy of *aparthied* is incompatible with the principle of sacred trust or with the Respondent's obligation under Article 2(2) of the Mandate. Judge Forster said : "Creating obstacles and multiplying barriers is not, in

my view, a way to contribute to the promotion of "the material and moral well-being and the social progress of the inhabitants of the territory"....."

Judge van Wyk also pointed out that the policies of differentiation were being applied by other League members in comparable territorities at the time of inception of the Mandate, and such policies were acquiesced in by the League and its Members. In this regard, Judge Jessup pointed out that the policies of differentiation and *aparthied* have been severely condemned by the United Nations' Members from 1946 onwards.

Judge van Wyk also pointed out that the policies in question were applied by the Respondent and other mandatories in the mandated territories under their respective administration, during the lifetime of the League, which, instead of objecting to them, approved the same; that the Applicants also did not object to such policies during the life-time of the League; and that except on one occasion, the aforesaid policies were, in basic and important respects, approved of by the Permanent Mandates Commission. Judge Wellington Koo disagreed with this conclusion and pointed out that the aforesaid policies were "consistently criticized and deprecated even in the days of" the Commission and the League, by the League Members and on one occasion, by the Commission itself.

Judge van Wyk further referred to "the uncontradicted evidence of the expert witnesses strongly" supporting the policy of differentiation, and expressed the view that "in determining its policies relating to the administration of the Territory the Respondent" was expected to have due regard to the realities of the situation. He pointed out that separate homelands for different nationalities were already there at the inception of the Mandate, and were not created by the Respondent; that the tribal economies of the natives in the Police Zone had been shattered; that the natives, who were "underdeveloped and illiterate, lacked the skills required for modern

economic and administrative activities"; and that white leadership and initiative became necessary in the sphere of maintaining law and order, managing and administering the mines, railways, harbours, hospitals and the civil service, and investment of capital and "enterpreneurial skill", while the natives provided unskilled labour. In the light of the aforesaid realities and the "vast differences between the different groups made this both natural and inevitable" for the Respondent to apply the "policies of differentiation such as, e.g., separate schools, separate residential areas, reserves for the different ethnic groups, influx control, etc.". The Respondent, according to Judge Tanaka, sought to establish the legality and reasonableness of these policies, by insisting that they constituted "the best way to realize the well-being and social progress of the inhabitants" and that the application of Western-type democracy to the territory "would necessarily lead to competition, friction, struggle, chaos, bloodshed, and dictatorship as examples may be found in some other African countries".

Even if the above-mentioned realities of circumstances in the territory be accepted as true, the question arises whether it is justified or valid to make the colour of the race, rather than the individual merit, as the basis of application of policies of differentiation. Judge Wellington Koo, Judge Tanaka and Judge Padilla Nervo were of the view that the policy of differentiation on the basis of colour or race was neither justified nor legally valid. Judge Wellington Koo referred to "the undisputed facts presented in the written and oral pleadings of the Parties and in the testimony and cross-examination of the witnesses and experts before the Court", which establish that discrimination based on grounds of race, colour or ethnic origin in matters of ownership of lands, mining and the mining industry, employment, vocational training, education, work, travel and residence, was totally unjustified. Judge Tanaka was of the view that "discrimination according to the criterion of "race, colour, national or tribal origin" in establishing the

rights and duties of the inhabitants of the territory is not considered reasonable and just. Race, colour, etc., do not constitute in themselves factors which can influence the rights and duties of the inhabitants as in the case of sex, age, language, religion, etc. If differentiation be required, it would be derived from the difference of language, religion, custom, etc., not from the racial difference itself". He also pointed out that the policy of *aparthied* made differentiation on an unjustified and unreasonable basis of race and colour. Judge Padilla Nervo criticized the view that *aparthied* was the only alternative to chaos". The basis of differentiation adopted in the policy of *aparthied* can hardly be regarded as reasonable or legally valid.

6. Modification by the Respondent of the terms of Mandate

1966 Judgment

Separate opinion

JUDGE VAN WYK

".....On the dissolution of the League of Nations, Article 7(1), in my view, lapsed in the same way, and for substantially the same reasons., Article 6, with which I dealt with above. It follows that, even if the Mandate were still in existence as an institution, Article 7(1) would no longer be in force. In my view no agreement has been concluded. Neither the United Nations nor any one of its organs has stepped into the shoes of the League Council as the authority whose consent is required for modification of the terms of the Mandate.

".....even if Applicants would be entitled to a declaration in terms of their Submission No. 2, that would not, in my view, justify a declaration that Respondent has violated other provisions of the Mandate, for example, that Respondent has attempted to modify the terms of the Mandate in contravention of Article 7(1) thereof".[46]

46 *Ibid.*, at pp. 214 and 215.

Dissenting opinions

JUDGE TANAKA

"The facts relied upon by the Applicants to establish the attempts by the Respondent to modify the Mandate are not specified in Final Submission No. 9, but they are referred to in Chapters V, VI, VII and VIII of the Memorials (Submission No. 9). Chapters V, VI, and VII deal with alleged violations of Article (2) of the Mandate and Chapter VIII deals with alleged violations of Article 4 of his Mandate.

"If the alleged violations of these Articles exist, the violation is simply concerned with the individual provisions and not with Article 7, paragraph 1".[47]

And

"For the reason indicated above, the Applicants' Submission No. 9 is not well-founded".[48]

JUDGE JESSUP

"It is equally clear that Court's earlier conclusion that nothing has sapped the vitality of Article 7(1) of the Mandate, stands on the same footing. In other words, the Mandatory could not modify the Mandate without consent. The consent originally was to be given by the Council of the League and now by the General Assembly of the United Nations. "Modification" of course includes "termination". Respondent admitted that some consent would be, or at least might be, required in order to make changes. The argument of Respondent seemed to be that an agreement to change or terminate the Mandate did not need to be reached with an organ of the United Nations but an agreement expressed through a resolution of the General Assembly would be a convenient "short-cut" so to speak, to securing the agreement of

47 *Ibid.*, at p. 323.
48 *Ibid.*, at p. 324.

various States. But Article 7(1) does not contemplate the need for consent of various States as such; it contemplates the need for the consent of the supervisory organ which originally was the Council of the League and now is the General Assembly of the United Nations".[49]

Comments

In connection with the necessity of consent of the League Council for any modification of the Mandate, please refer to the discussions contained in item 6, Chapter III of this Study.

Judge van Wyk was of the view that Article 7(1) of the Mandate did not survive the dissolution of the League, inasmuch as the supervisory authority disappeared without having been replaced by another authority, and that it was not necessary for the Mandatory to obtain any consent for modifying the terms of the Mandate. In this connection we may refer to Chapter IV of this Study, where we arrived at the conclusion that on dissolution of the League, the United Nations General Assembly became the supervisory authority. Accordingly, on dissolution of the League, it became necessary, under Article 7(1) of fhe Mandate, to obtain consent of the United Nations General Assembly for any modification of the terms of the Mandate. According to Judge Jessup, Article 7(1) "contemplates the need for the consent of the supervisory organ which originally was the Council of the League and now is the General Assembly of the United Nations".

The Applicants in Submission No. 9 of the Memorials alleged that the Resp ndent had violated its obligations under Article 7(1) of the Mandate by modifying substantially the terms of the Mandate, without the consent of the United Nations. Judge Tanaka pointed out that the facts relied upon by the Applicants in this connection "are not specified in Final Submission No. 9, but they are referred to in Chapters V, VI,

49 *Ibid.*, at pp. 388 and 389.

VII and VIII of the Mandate..... Chapters V, VI and VII deal with alleged violations of Article 2 of the Mandate and Chapter VIII deals with alleged violations of Article 4 of the Mandate." He expressed the view that these facts could be relied upon only in connection with violations of Articles 2 and 4 of the Mandate and not with violation of Article 7(1); and that, accordingly, the Applicants' Submission No. 9 was not well-founded. Judge van Wyk reached the same conclusion through a different line of argument, which was to the effect that, in as much as Article 7(1) of the Mandate did not survive the dissolution of the League, the Applicants could not obtain a declaration in respect of their allegation regarding contravention by the Respondent of the said Article. For reasons dealt with under Chapter IV of this Study, Judge van Wyk's line of argument cannot be regarded as sound.

7. Measures taken by Respondent to incorporate the territory into South Africa

1966 Judgment

Separate opinion

JUDGE VAN WYK

"The four actions relied upon in the Memorials were :

(a) "General conferral" of South African citizenship upon inhabitants of South West Africa.

(b) Inclusion of representatives from South West Africa in the South African Parliament.

(c) Administrative separation of the Eastern Caprivi Zipfel from the rest of South West Africa.

(d) The vesting of South West Africa Native Reserve Land in the South African Native Trust, and the transfer of administration of Native affairs to the South African Minister of Bantu Administration and Development.

In my view it is unquestionable that these administrative and legislative provisions *prima facie* did not go beyond an exercise of the "full power of administration and legislation" vested in Respondent, including the right to administer the Territory as an integral portion of the Union of South Africa".....[50]

And

"The firm conclusion from the admissions and the eventually undisputed facts is therefore that Respondent was not motivated by, and indeed did not have any intention or motive to annex or incorporate the Territory, and that the measures complained of were not only intended for the benefit of the inhabitants of the Territory, but, in fact operated to their benefit."[51]

And

"In the first place, its effect now is that Submission No. 5 amounts merely to a paraphrase of Submissions Nos. 2, 7 and 8. Consequently there appears little purpose in retaining it as a separate submission....."[52]

Dissenting opinions

JUDGE TANAKA

"We consider that the act of the general conferment of Union citizenship upon the inhabitants of the Territory

50 *Ibid.*, at p. 194.

51 *Ibid.*, at p. 196.

52 *Ibid.*, at p. 205.