being inconsistent with the international status of the Territory, goes beyond the scope and limit of the discretionary power recognized by Article 2, paragraph 1, of the Mandate and that Article 2, paragraph 1, of the Mandate, which stipulates that ".....the Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa to the territory" .....cannot be interpreted to justify such general conferment of Union citizenship. The reason for this is supposed to be that this provision recognizes such power in respect of administrative and legislative matters in the 'C' mandate because of the technical consideration of expediency and economy whilst not allowing highly political acts which may effect the international status of the Territory."[53]

And

".....the Respondent cannot justify the inclusion of the representatives from South West Africa by referring to the phrase "as an integral portion of the Union" in Article 2, paragraph 1, of the Mandate. The act of the Respondent is inconsistent with the international status of the Territory recognized by the provisions of Article 22 of the Covenant as well as by the Mandate for South West Africa."[54]

And

".....the Applicants' contention on this matter (item C) is not well-founded."[55]

53 *Ibid.*, at p. 317.

54 *Ibid.*, at p. 318.

55 *Ibid.*, at p. 319.

And

".....the Applicants' contention under (d) is not well-founded."[56]

Comments

In Submission No. 5 of the Memorials, the Applicants alleged that the Respondent had taken certain measures which amount to incorporation of the territory in South Africa, and which are inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory". The measures in question were :

(a) "General conferral of South African citizenship upon inhabitants of the Territory.

(b) Inclusion of representatives from the Territory in the South African parliament.

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

And

(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.

As regards Applicants' Submission No. 5, Judge van Wyk expressed the view that the said submission "amounts merely to a paraphrase of Submissions Nos. 2, 7 and 8," and that there was "little purpose in retaining it as a separate submission. As regards the measures complained of, he expressed the view that they were administrative and legislative acts

56 *Ibid.*, at p. 319.

which "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" ; that the Respondent, in taking these measures was not motivated by any intention to incorporate the territory into South Africa ; and that the aforesaid measures "were not only intended for the benefit of the inhabitants of the Territory, but, in fact operated for their benefit.

However Judge Tanaka regarded the Applicants' contention in respect of measures (a) and (b) as well-founded, and those in respect of measures (c) and (d) as not well-founded. He expressed the view that the provisions of Article 2 (1) of the Mandate, conferring on the Mandatory "full powers of administration and legislation over the territory...as an integral portion of "South Africa, empowered the Mandatory only to take necessary administrative and legislative measures "because of the technical consideration of expediency and economy," and not the "highly political acts which may affect the international status of the Territory." According to him, the general conferment of South African citizenship went beyond the discretion vested in the Respondent under Article 2 (1) of the Mandate in respect of the said administrative and legislative measures, inasmuch as it amounted to a highly political act. He also regarded the inclusion of the representatives from the territory in the South African Parliament, as a highly political act, which was beyond the discretion vested in the Mandatory under Article 2 (1), and which was inconsistent with the international status of the Territory. As such, measures (a) and (b), according to Judge Tanaka, amounted to attempts on the part of the Respondent to modify the international status of the territory and to incorporate the territory into South Africa.

8. Military training of natives and establishment of military bases on the territory

1966 Judgment

Separate opinion

JUDGE VAN WYK

"...if we have regard to the informal statement by Applicants' Agents in the oral proceedings as to what the Applicants' case really is, the complaint appears to be that Respondent would, in the absence of international supervision, be able to militarize the Territory without anybody being aware thereof. This line of argument clearly provides no support for a contention that "Respondent has established military bases within the Territory, nor does it in fact suggest any other violation of Article 4 of the Mandate."[57]

Dissenting opinion

JUDGE TANAKA

"...the prohibition of the military training of the Natives is not absolute ; the military training of the Natives for the purposes of internal police and the local defence of the Territory is permissible. The reason thereof may be that the internal police and the local defence are not related to the humanitarian idea of this provision."[58]

And

"As to the Applicants' submission, it is the military bases alleged to be established in the Territory by the Respondent that are in question, not the military training

57 *Ibid.*, at p. 213.
58 *Ibid.*, at p. 321.

of the Natives. The Applicants allege that the Respondent maintains three military bases within the Territory, which are the Regiment Windhoek, a military landing ground in the Swakopmund District of South West Africa and "at least one military facility in or near the Kaokoveld" in part of the Territory."[59]

And

"On the evidence before the Court the Respondent did not establish any military or naval bases in the Territory. Therefore, Applicants' Submission No. 6 is not well-founded."[60]

Comments

Article 4 of the Mandate provides :

"The military training of the natives otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory". (See Annexure II to this Study).

In Submission No. 6 of the Memorials, the Applicants alleged that the Respondent had established military bases in the Territory in violation of its obligations under the aforesaid Article. This allegation, when interpreted in the light of the informal statement by Applicants' Agent, discloses that the Applicants' case in the words of Judge van Wyk, "appears to be that Respondent would, in the absence of international supervision, be able to militarize the Territory without anybody being aware thereof."

The aforesaid contention, according to Judge van Wyk, is obviously different from the allegation that the Respondent

59 *Ibid.*, at p. 322.
60 *Ibid.*

had actually established military bases within the territory, or that Article 4 of the Mandate had been violated in any other manner. Judge Tanaka pointed out that, according to Applicants' Submission, the question in issue before the Court related, not to the military training of the natives, but to establishment by the Respondent of three military bases in the territory, "which are the Regiment Windhoek, a military landing ground in the Swakopmund District of South West Africa and at least one military facility in or near the Kaokoveld." On an examination of the evidence before the Court, he came to the conclusion that the Respondent did not establish any military or naval bases in the Territory. Therefore, Applicants' Submission No. 6 is not well-founded".

9. Refusal by Respondent to submit annual reports, and transmit petitions, to the United Nations

In connection with the question of Respondent's refusal to submit annual reports and transmit petitions, to the United Nations, the excerpts and the comments under items 10 and 11 of Chapter IV of this Study may be referred to.

10. Conclusions

On the basis of discussions contained in the present Chapter, we arrive at the following conclusions :

(i) That the Respondent's policy of *aparthied,* being not based on a national criterion of differentiation, is in violation of the international legal norm and standards of non-discrimination, as also in violation of Respondent's obligations under Article 2 (2) of the Mandate. (Refer to Applicants' Submission Nos. 3 and 4).

(ii) That the Applicants' allegation, contained in Submission No. 9 of the Memorials, in respect of modification by the Respondent of the terms of the

Mandate in violation of its obligation under Article 7 (1) of the Mandate, is not well-founded.

(iii) That the measures taken by Respondent in conferring generally the South African citizenship upon the inhabitants of the territory and in including the representatives from South West Africa in the South African Parliament are inconsistent with the international status of South West Africa. On the other hand, Applicants' allegations in respect of administrative separation of Eastern Caprivi Zipfel from the rest of South West Africa, 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 are not well-founded. (Refer the Applicants' Submission No. 5).

(iv) That the Applicants' allegation, contained in Submission No. 6, in respect of establishment by the Respondent of military bases in the Territory is not sound. And

(v) That by refusing to submit annual reports, and to transmit petitions, to the United Nations, the Respondent has violated its obligations under the Mandate and Article 22 of the Covenant. (Refer to Applicants' Submission Nos. 7 and 8).

CHAPTER VII

WAYS AND MEANS OF SOLVING THE DISPUTE

1. *Resolution of the United Nations General Assembly terminating the Mandate and subsequent events.*
2. *Legal validity of termination of the Mandate by the United Nations General Assembly.*
3. *Alternative courses of action.*

1. Resolution of the United Nations General Assembly terminating the Mandate and subsequent events

On the 27th October, 1966, the General Assembly of the United Nations adopted a 54-nation resolution, as amended by 19 Latin American States, Trinidad and Tobago, and Jamaica, terminating the Mandate for South West Africa and assuming a direct responsibility to administer the territory.[1] In its preamble, the resolution affirmed that the administration of the territory had been conducted in a manner contrary to the Mandate, the United Nations Charter and the Universal Declaration of Human Rights; "condemned the policies of *aparthied* and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity"; noted that all the efforts of the United Nations to make the Government of South Africa respect and carry out its obligations under the Mandate had failed ; noted "with deep concern the explosive situation which exists in the southern region of Africa"; and affirmed the right of the United Nations General Assembly "to take appropriate action in the matter including the right to revert to itself the administration

1 Resolution 2145 (XXI) of 27 October, 1966. See VIII Annexure to this Study.

of the Mandated Territory". In its operative part, the resolu- reaffirmed the inalienable right of the people of South West Africa "to self-determination, freedom and independence in accordance with the Charter"; reaffirmed further that the international status of South West Africa shall continue until it achieves independence; declared that South Africa had failed to fulfil its obligations under the Mandate "and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, and has, infact, disavowed the Mandate"; and decided to terminate the Mandate "conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa", while declaring, at the same time "that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations."

The resolution also provided for an *Ad Hoc* Committee of 14 Member States, "to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967". The members of the Committee were nominated by the President of the General Assembly. The Committee held its meetings from 17th January 1967 through 29th March 1967. It received three formal sets of proposals before it:

(i) A five-Power proposal originally submitted by Ethiopia, Nigeria, Pakistan, Senegal and the U.A.R., which would have the Assembly create a U.N. Council for South West Africa, which would proceed immediately to the Territory after its election for taking over the administration of the territory and ensuring the withdrawal of South African police and military forces. It would also have the Assembly declare South Africa's continued presence in the territory, as also action

by South Africa which frustrates or obstructs the task of the Council as an act of aggression while the Security Council would take enforcement action against South Africa for the same. The proposal also envisaged complete independence for the territory not later than June 1968.

(ii) A three-power proposal submitted by Canada, Italy and U.S.A., which would have the Assembly appoint a Special Representative for South West Africa, who would report to a U.N. Council for South West Africa. The Special Representative would have a mandate to make a comprehensive survey of the situation in the territory, determine the necessary conditions that would enable South West Africa to achieve self-determination and independence and report to the Assembly at its 1967 session.

(iii) A proposal by Chile and Mexico which would have the Assembly create a U.N. Council for South West Africa. This Council would assume full responsibility for the administration of the territory and would take steps to establish a constituent assembly charged with drawing up an independence constitution for the territory under which elections based on universal adult suffrage would be held. The Council would entrust tasks of an executive and administrative nature to a U.N. Commissioner for South West Africa, and would contact the authorities of the Republic of South Africa in order to lay down procedure for the transfer of the territory with the least possible upheaval. The Council would have, for the enforcement of law and public order, a police force "to be organized locally or, if necessary, provided by the United Nations".

The *Ad Hoc* Committee was unable to reach a consensus on any of the aforesaid proposals, and in its meeting of 29th March 1967, it decided to submit all these proposals to the Fifth Special Session of the General Assembly. The Assembly discussed the Committee's report, also a draft resolution submitted by 58 States and a draft resolution submitted by Saudi

Arabia and on 19th May 1967 it adopted a resolution[2] (co-sponsored by 79 African, Asian and Latin American States and Yugoslavia), establishing an 11-member United Nations Council for South West Africa to administer the territory until independence of the territory, which, it provided, should come about by June 1968. It also empowered the Council to promulgate regulations "until a legislative assembly is established following elections conducted on the basis of universal adult suffrage"; to take immediate measures for setting up of "a constituent assembly to draw up a constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government"; and "to transfer all powers to the people of the Territory upon the declaration of independence". The Council was to be responsible to the General Assembly.

The resolution also requested the Council-which 'shall be based in South West Africa"-to enter immediately into contact with the authorities of South Africa to lay down procedures "for the transfer of the administration of the territory with the least possible upheaval, and to proceed to South West Africa with a view to taking over the administration of the Territory and securing withdrawal of South African police, military force and personnel. The resolution also provided for the office of a U.N. Commissioner for South West Africa to whom the Council could entrust such executive and administrative tasks as it might deem necessary. The resolution also requested "the Security Council to take all appropriate measures to enable the United Nations Council for South West Africa to discharge the functions and responsibilities entrusted to it by the General Assembly".

On 13th June 1967, the General Assembly elected 11 members for the Council, and on the nomination by the U.N.

2 Resolution 2248 (X—V) of 19 May, 1967. See Annexure IX to this Study.

Secretary-General, appointed Constantin A. Stavropoulos as the Acting U.N. Commissioner for South West Africa. (See Annexure IX to this Study). It may be noted here that South Africa has already called the resolution of 27th October 1966 terminating the Mandate, as illegal and *ultra vires*. Richard A. Falk has expressed the view that the "enforceability of this resolution appears highly unlikely for the time being, and its legal bearing on the Mandate is uncertain at this time. This action by the Assembly may encourage Balthasar Vorster, thought to be an advocate of annexation, to annex South West Africa. Annexation, although obviously a violation of the Mandate, would probably make it increasingly difficult to proceed separately against South West Africa and might require any enforcement action to be directed against South Africa itself".[3]

2. Legal validity of termination of the Mandate by the United Nations General Assembly

On the basis of the discussions contained in Chapter IV of this Study, we came to the conclusion that, on dissolution of the League, international supervision of the administration of the territory by the Mandatory passed on to the United Nations General Assembly from the League Council. Further, on the basis of the discussions contained in item 6 of Chapter VI of this Study, we came to the conclusion that Article 7 (1) survived the dissolution of the League and that the said Article, in the words of Judge Jessup, "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."[4]

Judge Jessup also expressed the view that the word "modification", as used in Article 7 (1) of the Mandate, inclu-

3 In his article on "South West Africa Cases" : *International Organization*, Vol. XXI, No. 1, Winter, 1967, pp. 4 and 5.

4 *South West Africa (second phase) Judgment, 1966*, at p. 389.

des "termination".[5] The question which now arises is whether the United Nations General Assembly can terminate the Mandate without the consent of the Mandatory or it is necessary for it to obtain consent of the Mandatory to such termination. The conclusion which we reached in this respect, on the basis of discussions contained in sub-item (iii) of item 4 of Chapter III of this Study, is that only the consent of the supervisory authority, which since the League's dissolution is the United Nations General Assembly, is necessary and not that of both the Mandatory and the United Nations. The wording of Article 7 (1) of the Mandate refers only to the consent of the League Council (which on dissolution of the League, is replaced by the United Nations General Assembly)' and not to that of both the Council and the Mandatory. Judge Wellington Koo,[6] and Judge Jessup,[7] in their dissenting opinions to the 1966 Judgment, also refer to only the consent of the supervisory authority, and not to that of both the said authority and the Mandatory.

However, this view is opposed not only by Judge van Wyk in his separate opinion to the 1966 Judgment, but also Judge Tanaka and Judge Padilla Nervo in their dissenting opinions to the 1966 Judgment. Judge van Wyk said that "the mandate would not be amended without the consent of the mandatory and the Council".[8] Judge Tanaka expressed the view that the "prohibition of unilateral modification exists not only in regard to the Mandatory but in regard to the League of Nations also."[9] Judge Padilla Nervo said that the "competence to determine and modify the international status of South West Africa rests with the Government of South Africa acting

5 *Ibid.*, p. 388.

6 *Ibid.*, p. 218.

7 *Ibid.*, p. 389.

8 *Ibid.*, p. 161.

9 *Ibid.*, at p. 323.

with the consent of the United Nations."[10]. However, the view that the Mandate cannot be modified or terminated without the consent of both the Mandatory and the United Nations, cannot be accepted for two reasons :

(i) Article 7 (1) of the Mandate provides only for a modification of the Mandate by the Mandatory—in which case consent of the League Council (now the United Nations General Assembly) was necessary - and not for a modification of the Mandate by the League Council (now the United Nations General Assembly).

(ii) The nature of the Mandate and the mechanism of the Mandates System (as also discussed in Chapter III of this Study) discloses that—

(a) the Mandate was exercised by the Mandatory on behalf of the League and for the fulfilment of the purpose defined in the Mandate;

(b) the Mandatory was in the position of a trustee or an agent of the League, entrusted with the task of realizing the purpose of the trust entrusted to the Mandatory, while the legal status of the "principal" always belonged to the League, on whose behalf the Mandatory exercised the Mandate;

(c) all the powers and authority given to the Mandatory were meant only to enable it to fulfil the purpose of the trust, and not to be used for its own benefit, and were to be exercised in the manner provided in the Mandate, and, for and on behalf of the League (See preamble to the Mandate Agreement-Annexure II to this Study); and

10 *Ibid.*, at p. 460.

(d) in the event of a misuse of its powers by the agent or the trustee or breach of the terms of the trust, the grantor of the power, which was the League and now the United Nations and on whose behalf the Mandate was exercised, always has the ultimate power to revoke and determine the agency or the trust, and to revert all the powers to itself.

In Chapter VI of this Study, we came to the conclusion that South Africa had violated the terms of the Mandate and its obligations contained in Article 2 (2) through its policy of *aparthied*, also those contained in Article 6 of the Mandate by refusing to submit annual reports, and to transmit petitions, to the United Nations, and had conferred South African citizenship on the inhabitants of the territory and had included representatives from the territory in the South African parliament, which measures amounted to incorporation of the territory in South Africa. Further, through its policy of *aparthied*, as applied to South West Africa, South Africa had obviously frustrated the main purpose of the sacred trust, which was to promote the material and moral well-being and social progress of the indigenous population of the territory. In view of these acts of misuse of its power, of violation of its obligations under the Mandate by the Mandatory, and of thwarting the very purpose of the Mandate, the United Nations General Assembly was legally justified in terminating the Mandate, and to revert to itself the authority and powers vested in the Mandatory in respect of administration of the territory. And it was not at all necessary for the Assembly to obtain, for terminating the Mandate, the consent of the Mandatory, which had misused its powers and violated its obligations, and which carried on administration merely as an agent. Thus the resolution of 27 October 1966, terminating the Mandate and placing the territory under direct responsibility of the United Nations, was legally valid and within the legal competence of

the United Nations General Assembly, which, on dissolution of the League, became the supervisory authority.

In order to dispel any doubt the legal validity of the resolution, it is suggested that the United Nations General Assembly may seek an advisory opinion of the International Court of Justice in the matter.

3. Alternative courses of action

Now that the United Nations General Assembly has established a United Nations Council for South West Africa to enter into contacts with the authorities of South Africa to lay down procedure for the transfer of the administration of the territory and has also appointed an Acting United Nations Commissioner for South West Africa, it is suggested that the following courses of action may be followed, either in the alternative or in the order in which they are specified below:

(i) Attempts may be made at negotiations between the United Nations Council for South West Africa and the Republic of South Africa (or negotiations between the Republic of South Africa and any other nominee or nominees of the United Nations or mediation or conciliation by a third party between the United Nations and the Republic of South Africa in case the same is deemed to be more appropriate), directed towards—

(a) securing an agreement with the Republic of South Africa, specifying measures for transfer of the administration of the territory to the United Nations Council for South West Africa, failing which, towards—

(b) securing an agreement with the Republic of South Africa, specifying measures to be taken by the Republic of South Africa before June 1968 (or some other date as may be agreeable

to both the Council and South Africa) for making the territory an independent country; failing which also, towards—

(c) securing an agreement with the Republic of South Africa, placing the territory under the United Nations Trusteeship System; failing which also, towards—

(d) securing an undertaking from the Republic of South Africa, re-affirming its obligation as a Mandatory to continue to administer the territory in accordance with the terms of the Mandate, while accepting the international supervision of the United Nations General Assembly in respect of the administration of the territory under the Mandate, and expressing its willingness to immediately cease applying to the territory, its policy of *aparthied.*

Suggestion Nos (c) and No. (d) made above certainly do not conform to the requirements of the General Assembly resolution of 19 May 1967, inasmuch as they do not envisage a transfer of the administration of the territory to the United Nations Council for South West Africa, or an independence of the Territory by June 1968. However, in the event of South Africa not agreeing to settle the dispute on the terms contained in suggestion (a) or even suggestion (b), it is suggested that negotiations with South Africa may be continued for a settlement on the basis of the proposal contained in suggestion (c), failing which, that contained in suggestion (d), in the hope of the United Nations being better placed to realize the objective of the territory's independence, at a later date. This may be necessary in view of the hard realities of the international political life, in view of which a settlement on the basis of suggesstion (c), or even suggestion (d) may not be a bad bargain for the United Nations, in the long run. It is felt that a

solution on the basis of suggestion (d) might be possible through negotiations, inasmuch as South Africa may be most willing to accept the same, and earning the goodwill of the international community, without making substantial changes in its present position in the territory. (However, all the aforesaid suggestions have been made without doubting, and without prejudice to, the legal validity of the resolution of 27 October 1966.)

(ii) In case all the attempts at negotiation, mediation and conciliation with South Africa, on the basis of the aforesaid, or some other appropriate proposals fail, it is suggested that one or more of the former Members of the League may institute contentions proceedings against South Africa, in the International Court of Justice, claiming—

(a) a declaration to the effect that South Africa has broken its obligations under the Mandate and has acted in such a manner as to frustrate the main purpose of the sacred trust, by following a policy of *aparthied* in the territory and by resorting to other measures discussed in Chapter VI of this Study;

(b) a declaration to the effect that as a result of the resolution of 27 October 1966 of the United Nations General Assembly, the Mandate has come to an end and that the Republic of South Africa has, thereafter, no legal authority to be present in any form in the territory; and

(c) an order requiring the Republic of South Africa to withdraw from the territory with effect from a date, specified by the Court, and to hand over, by such date, the administration of the territory of the United Nations or to the nominee or nominees thereof.

Mr. Richard A. Falk has pointed out that as "far as South West Africa is concerned, judicial action in the future is not foreclosed by the decision of 1966. The advisability of re-litigating some of the issues will depend upon both the prospects for a legal victory in a fairly short period of time and the outlook for translating a legal victory into an enforceable judgment of some significance soon thereafter, especially in light of what might be a new legal status of South West Africa created by the resolution of the General Assembly terminating South Africa's responsibilities as Mandatory."[11]

In case the Republic of South Africa refuses or fails to carry out the judgment of the Court granted substantially in the terms specified above, it is further suggessted that the Applicant or Applicants, as the case may be, may have recourse to the United Nations Security Council, requesting it to exercise the powers vested in it under Article 94 (2) of the Charter, in order to secure an implementation of the judgment by the Republic of South Africa. The Security Council may also order necessary enforcement action under Chapter VII of the Charter, after declaring the existence of the threat to peace because of South African attitude with respect of South West Africa. The General Assembly, in its resolution of 19 May 1967, has also requested the Security Council to take all necessary measures to enable the United Nations Council for South West Africa to discharge its functions and responsibilities. Mr. Richard A. Falk sees the possibility of the solution of the problem only in an effective enforcement action by the United Nations Security Council. He is of the view—

> "In essence, the conflict over South West Africa has become increasingly defined in polar terms and its resolution appears to depend almost exclusively on the ability or inability of the United Nations

11 In his article on "South West Africa Cases" : *International Organization*, Vol. XXI, No. 1, Winter, 1967, p. 23.

> majority to bring overwhelming military power to bear. Nothing short of such an eventuality appears to have any prospect of altering the quantity or quality of South African control over South West Africa."[12]

In this respect, it is suggested that military measures against South Africa may be taken only as a last resort, and after the various suggestions specified in the present item of this Chapter have been tried and found to be of no avail.

12 *Ibid.*, at p. 5.

CHAPTER VIII

QUESTION OF RESTORING CONFIDENCE IN THE INTERNATIONAL COURT OF JUSTICE

1. *Crisis of confidence in the Court.*
2. *The Court upheld technicality rather than spirit of law.*
3. *Representation of the main forms of civilization and principal legal systems of the world in the Court.*

1. Crisis of confidence in the Court

In 1960 when the cases were instituted by the Applicants in the Court, there were high hopes that the results of the proceedings would demonstrate, particularly to the newly independent States, that international adjudication could be used as an effective means of pacific settlement of even the explosive problems like that of South West Africa. However, these hopes were dashed to the ground as a result of the Judgment of the Court in 1966. This, according to Mr. Richard A. Falk, "generated widespread hostility to the International Court of Justice and indirectly seem to have damaged the cause of international law in general. A negative attitude towards international legal order, especially on the part of the African and Asian states, may do permanent harm to the rule of law in world affairs if the first wave of dismay aroused by the decision is converted into a final assessment."[1] He also pointed out that amongst the criticisms of adjudication as a means of pacific settlement that are being made, are those relating to the "frustration and expense, the interminable delay, and the demoralizing impact on disputants", and that confidence in the Court has been undermined.

1 See his article on "South West Africa Cases" : *International Organisation*, Vol. XXI, No. 1, Winter, 1967, p. 1.

In order to ascertain whether, and if yes, to what extent, the aforesaid attitude is objectively justified, an analysis of the circumstances surrounding the final outcome of the case, becomes necessary.

2. The Court upheld technicality rather than spirit of law

In its 1966 Judgment the Court came to the conclusion that the Applicants had no legal right or interest in the subject-matter of their claims, which, according to it, related to the so called "conduct" provisions of the Mandate. It did not choose to openly reverse the 1962 Judgment. "Therefore, the majority opinion relies upon highly technical and artificial reasoning to demonstrate that the 1962 Judgment does not preclude a 'procedural' dismissal in 1966. This way of proceeding is in line with the judicial conservatism of the majority."[2]

The highly technical and artificial reasoning adopted by the majority in order to arrive at the above conclusion, as also the sharp divisions made between law and morals, and law and politics, while ignoring the main purpose of the sacred trust and the mechanism provided in the Mandate for achievement thereof, also point to the attitude of judicial conservatism on the part of the majority.

The majority in 1966 followed a positivist approach which was ridden with the concept of state sovereignty and firmly believed in, and applied, the concepts of traditional international law as evolved by the so-called "civilized nations." This is clearly reflected in their treatment of the issue such as (i) Applicants' legal right or interest in respect of the conduct of the Mandate; (ii) distinction between the Court's jurisdiction and the Applicants' standing before the Court; (iii) mechanism of judicial control of the sacred trust as provided in the Mandate; (iv) lapse of the Mandate and the international supervision on

2 See his article on "South West Africa Cases" : *International Organisation*, Vol XXI, No. 1, Winter, 1967, p. 7.

dissolution of the League; (v) Mandatory's international accountability under Article 6 of the Mandate; (vi) the concept of well-being and progress of the indigenous population; (vii) extent and scope, and the permissible manner of exercise, of discretion by the Mandatory; and (viii) avoiding to deal with the real issues of the case. Justice M. Hidayatullah of the Supreme Court of India points out : "All the time the main issue has been avoided, which is whether South Africa is going against the Mandate and its obligations, and whether the Applicants who had proved themselves to be other Members of the League could not ask for the interpretation and application of the Mandate by the Court in relation to the facts established ? Is it, therefore, surprising that there should be criticism all over the world ?' [3]

The problem, in relation to the future of adjudication by the International Court, is essentially that of representation on the Court of the Judges, inasmuch as in 1966 majority of the Judges stuck to the concepts of traditional international law, as evolved by the so-called "civilized nations". Since, the Judges who believed in such concepts happened to be in majority in 1966, the Judgment of the Court came to be what it is.

3. Representation of main forms of civilisation and principal legal systems of the world in the Court

In its 1962 Judgment, the Court rejected the Respondent's preliminary objections to its jurisdiction by a narrow majority of 8—7. In 1966 the Court was equally divided on the question whether the Applicants had legal right or interest in the subject-matter of their claims, and the negative decision became possible only as a result of the casting note of the President of the Court, Sir Percy Spender, who was elected as President in the intervening period, and of the non-participation, in the second phase of the proceedings, by Judge Zafrulla Khan. It would not be wrong to reach the conclusion that the virtual

3 In his book on *The South West Africa Case*. p. 83.

reversal of the 1962 Judgment came about as a result of a change in the composition of the Court in 1966; and that the final outcome of the case depended, in material respects on such change.

Article 9 of the Statute of the International Court of Justice provides an appropriate standard in respect of the compositon of the Court. It says :

> "At every election (of the Judges of the International Court of Justice), the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

The soundness of the standard of "the representation of the main forms of the civilization and of the principal legal systems of the world", insofar as the composition of the Court is concerned, can hardly be doubted. The main forms of civilizations in the present-day world can be said to be the Western civilization, the Islamic civilization, the African civilization, the South and South-East Asian civilization, the Sino-Japanese civilization and the Communistic civilization. The principal legal systems are the Anglo-American legal system, the Continental legal system, the African legal system, the Islamic legal system, the Non-Islamic Asian legal system and the Communistic legal system.

If we, now examine the extent to which the standard of "representation of the main forms of civilization and the principal legal systems of the world" has been observed in respect of the Judges in the International Court at the time of the 1966 Judgment, and again in respect of those in the Court as constituted at present, we get at the following picture :

I. **The Western Civilization**

(a) *Anglo-American legal system*

1966	*1967*
Sir Gerald Fitzmaurice (U.K.)	Sir Gerald Fitzmaurice (U.K.)
Philip C. Jessup (U.S.A.)	Philip C. Jessup (U.S.A.)
Sir Percy Spender (Australia)	

(b) *Continental legal system*

Andre Gros (France)	Andre Gros (France)
Gaetano Morelli (Italy)	Gaetano Morelli (Italy)
Spiropoulous (Greece)	Sture Petren (Sweden)
Luis Padilla Nervo (Mexico)	Luis Padilla Nervo (Mexico)
Bustamante (Peru)	

II. **Islamic Civilization and legal system**

1966	*1967*
Zafrulla Khan (Pakistan)	Zafrulla Khan (Pakistan)
Badawi Pasha (U.A.R.)	Fouad Ammoun (Lebanon)

III. **African Civilization and legal system**

1966	*1967*
Isaac Forster (Senegal)	Isaac Forster (Senegal)
	Charles D. Onyeama (Nigeria)

IV. **Non-Islamic Asian legal system**

(a) *Sino-Japanese civilization*

1966	*1967*
Wellington Koo (China)	Wellington Koo (China)
K. Tanaka (Japan)	K. Tanaka (Japan)

(b) *South and South East Asian civilization*

1966	*1967*
None	Caesor Bengzon (Phillipines)

V. **Communistic civilization and legal system**

1966	*1967*
M. M. Winiarski (Poland)	Manfred Lachs (Poland)
Vladimir M. Koretsky (U.S.S.R.)	Vladimir M. Koretsky (U.S.S.R.)

On examining the above picture, we find that in 1966 whereas the continental legal system was over-represented in the Court, the African civilization and legal system was under-represented and the South and South-East Asian civilization was not represented at all. These discrepancies have been corrected to a great extent as far as the present composition of the Court is concerned. However, the continental legal system is still over-represented, whereas the African civilization and legal system and the African, Islamic, and South and South-East Asian civilizations and legal systems are not adequately represented. In this connection Mr. Richard A. Falk has observed : "Another proposal, bound to be made in the near future, is to enlarge the number of judges on the Court to assure greater representation for the Afro-Asian group as the enlargement of the size of the Security Council has already done. The enactment of such a proposal would probably make the Court more receptive to litigation with political and moral overtones although it might also build an image of the Court as a rubber stamp of the General Assembly and thereby diminish its prestige as a judicial organ."[4] We certainly do not agree with the view that an enlargement of the number of judges would make the Court a rubber stamp of the General Assembly. It is hoped that an increase of the aforesaid nature would satisfy the standard of "representation of the main forms of civilizations and the principal legal systems" in a greater measure.

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4 In his article on "South West Africa Case"; *International Organisation*, Vol. XXI, No. 1, Winter. 1967, p. 19.

As regards the final outcome of the matter in case the dispute concerning South West Africa is once again brought before the Court, it may be observed that the Court, as constituted at present (1967), is more likely to oppose the *apartheid* policy and favour the termination of the Mandate and assumption of administration by the United Nations, in view of the recent election of five new judges. These are Fouad Ammoun (Lebanon), Charles D. Onyeama (Nigeria), Caesor Bengzon (Philippines), Manfred Lachs (Poland), and Sture Petren (Sweden). These vacancies were caused by the retirement of Judges Sir Percy Spender, Spiropoulous, and Winiarski, all of whom voted with the majority in 1966, and death of Judge Badawi Pasha and the disablement of Judge Bustamante, both of whom, in 1966, appeared favourable to the Applicants. The election of the aforesaid five new judges is also expected to bring an end to the former attitude of judicial conservatism on the part of the majority of the judges in the Court.[5]

5 *Ibid.*, at p. 19.

ANNEXURES

(I)

ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS

Article 22 reads as follows:

"(1) To those colonies and territories which as a consequence of the late War have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

(3) The character of the mandate must differ according to the stage of the development of the peoples, the geographical situation of the territory, its economic conditions and other similar circumstances.

(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal