5. the Union, by word and by action, in the respects set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory; and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the action summarised in section C of the Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the territory;

6. the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory;

7. the Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations as under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly;

8. the Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that the Union has the duty to transmit such petitions to the General Assembly;

9. the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

The Applicant reserves the right to request the Court to declare and adjudge in respect of events which may occur subsequent to the date this Memorial is filed, including any event by which the Union's juridical and constitutional relationship to Her Britannic Majesty undergoes any substantial modification.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Memorial, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations;"

In November 1961, *South Africa filed four preliminary objections* contesting the jurisdiction of the Court to hear the dispute brought by Ethiopia and Liberia. In its amended submissions, South Africa submitted that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings, and that the Court has no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the Applications and Memorials more particularly because:

Firstly, the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer a "treaty or Convention in force" within the meaning of Article 37 of the Statute of the Court, this submission being advanced

(a) with respect to the Mandate as a whole including Articles thereof ; and

(b) in any event, with respect to Article 7 itself ;

Secondly, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa;

Thirdly, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved or affected thereby;

Fourthly, the alleged conflict or disagreement is, as regards its state of development, not a 'dispute' which 'cannot be settled by negotiations' within the meaning of Article 7 of the Mandate for South West Africa."

4. The 1962 Judgment on preliminary objections

The Court, in its judgment of 21 December 1962, dismissed all four of the objections raised by the Respondent and concluded by 8 votes to 7, that "Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court, and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiations." It held that it had jurisdiction to adjudicate upon the merits of the dispute.

5. Proceedings on the merits

(i) *Written Pleadings:* In the course of the written proceedings, the following submissions, apart from those stated before, were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia, in the Reply :

"Upon the basis of allegations of fact in the Memorials, supplemented by those set forth herein or which may subsequently be adduced before this Honourable Court, and the statements of law pertaining thereto, as set forth in the Memorials and in this Reply, or by such other statements as hereafter may be made, Applicants respectfully reiterate their prayer that the Court adjudge and declare in accordance with, and on the basis of, the Submissions set forth in the Memorials, which Submissions are hereby reaffirmed and incorporated by reference herein.

Applicants further reserve the right to request the Court to declare and adjudge in respect of events which may occur subsequent to the date of filing of this Reply.

Applicants further reiterate and reaffirm their prayer that it may please the Court to adjudge and declare whatever else it may deem fit and proper in regard to the Memorials or to this Reply, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa in the Counter-Memorial:

"Upon the basis of the statements of fact and law as set forth in the several Volumes of this Counter-Memorial, may it please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia as recorded at pages 168 to 169 of their Memorials are unfounded and that no declaration be made as claimed by them.

In particular Respondent submits:

1. That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations, and that

Respondent, is, in consequence thereof, no longer subject to any legal obligations thereunder.

2. In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:

(a) Relative to Applicants' Submissions Nos. 2, 7 and 8, that Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organisation or body. Respondent is therefore under no obligation to submit reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body.

(b) Relative to Applicants' Submissions Nos. 3, 4, 5, 6 and 9, that Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations;

In the rejoinder:

"1. Upon the basis of statements of law and fact set forth in the Counter-Memorial, as supplemented in this Rejoinder and as may hereafter be adduced in further proceedings, Respondent reaffirms the Submissions made in the Counter-Memorial and respectfully asks that such Submissions be regarded as incorporated herein by reference.

2. Respondent further repeats its prayer that it may please the Court to adjudge and declare that the Sub-

missions of the Governments of Ethiopia and Liberia, as recorded in the Memorials and as reaffirmed in the Reply, are unfounded, and no declaration be made as claimed by them."

(ii) *Oral Proceedings*: In the oral proceedings the following Submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia, at the hearing on 19 May 1965:

"Upon the basis of allegations of fact and statements of law set forth in written pleadings and oral proceedings herein, may it please the Court to adjudge and declare, whether the Government of the Republic of South Africa is present or absent, that:

(1) South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, confirmed by the Council of the League of Nations on 17 December 1920 ;

(2) Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;

(3) Respondent by laws and regulations and official methods and measures which are set out in the pleadings herein, has practised *apartheid, i.e.* has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in

Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that Respondent has the duty forthwith to cease the practice of *apartheid* in the Territory;

(4) Respondent, by virtue of economic, political, social and educational policies applied within the Tertitory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles;

(5) Respondent by word and by action has treated the Territory in a manner inconsistent with the international status of the Territory and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Respondent's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to cease such actions, and to refrain from similar actions in the future; and that Respondent has duty to accord full faith and respect to the international status of the Territory;

(6) Respondent has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that Respondent has duty forthwith to remove all such military bases from within the Territory; and that Respondent has the duty to refrain from the establishment of military bases within the territory;

(7) Respondent has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that Respondent has the duty forthwith to render such annual reports to the General Assembly;

(8) Respondent has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that Respondent has the duty to transmit such petitions to the General Assembly;

(9) Respondent has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of Respondent directly or indirectly to modify the terms of the Mandate.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to these submissions, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa,
at the hearing on 5 November 1965:

"We repeat and reaffirm our submissions, as set forth in Volume I, page 6, of the Counter-Memorial and confirmed in Volume II, page 483, of the Rejoinder. These submissions can be brought upto-date without any amendments of substance and then they read as follows :

Upon the basis of the statements of facts and law as set forth in Respondent's pleadings and the oral proceedings, may it please the Court to adjudge and declare that the submissions of the Governments of Ethiopia and Liberia, as recorded at pages 69-72 of the verbatim record of 19 May 1965, C. R. 65/35, are unfounded and that no declaration be made as claimed by them.

In particular, Respondent submits—

(1) That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder ;

(2) In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations ;

(a) Relative to Applicant's submissions Nos. 2, 7, and 8, that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar organ of of the United Nations or any other organisation or body. Respondent is therefore under no obligation to submit reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body ;

(b) Relative to Applicant's submissions Nos. 3, 4, 5, 6 and 9, that the Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations."

(iii) *Witnesses :* A considerable number of witnesses were also heard by the Court.

6. Issues framed by the Court[1]

(i) Whether the Mandate for South West Africa was still in force?

(ii) If so, whether the Mandatory's obligation under Article 6 of the Mandate to furnish annual reports to the Council of the former League of Nations concerning its administration of the mandated territory had become transformed by one means or another into an obligation to furnish such reports to the General Assembly of the United Nations, or had, on the other hand lapsed entirely?

(iii) Whether there had been any contravention by the Respondent of the second paragraph of Article 2 of the Mandate which required the Mandatory to "promote to the utmost the material and moral well-being and the social progress if the inhabitants of the territory"?

(iv) Whether there had been any contravention of Article 4 of the Mandate, prohibiting (except for police and local defence purposes) the "military training of the natives" and forbidding the establishment of military or naval bases, or the erection of fortifications in the territory ?

The Applicants also alleged that the Respondent had contravened paragraph 1 of Article 7 of the Mandate (which provided that the Mandate can only be modified with the consent of the Council of the League of Nations) by attempting to modify the Mandate without the consent of the General Assembly of the United Nations which had replaced the Council of the League of Nations for this and other purposes.

As regards the issues involved in the case, the Court was of the view that "there was one matter that appertained to the

[1] See paras. 3 to 6 of the Judgment.

merits of the case but which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings—not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right or interest regarding the subject-matter of their claim, as set out in their final submissions." Further, the Court said : "Despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved.... The Parties having dealt with all the elements involved, it became the Court's duty to begin by considering those questions which had such a character that a decision respecting any of them might render unnecessary an enquiry into other aspects of the matter."

7. 1966 Judgment

The Court concluded that the Applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them. By the President's casting vote—the votes being equally divided—the Court decided to reject the claims of the Applicants.

8. Aspects of the case examined in the present Study

In the light of the discussion on the subject at the Eighth Session of the Committee as also in the light of the suggestions contained in the Ceylon Government's letter No. AALCC/27 dated 8th May, 1967 and the Government of India's letter dated 5th September, 1967, the following aspects of the case have been examined in the present study.

1. Whether there is, in law, a distinction and a difference between a preliminary objection and an antecedent question and if so, whether it was validly and appropriately applied on the facts of the case having regard to the proceedings of the first phase of the case.

2. Whether the Court's failure to indicate to the Applicants that it reserved the right to reconsider the question of standing when it decided the case on the merits and its decision to rule thereon without a full argument occasioned a failure of justice.

3. Applicability of the doctrine of *res judicata*. The question whether the Judgment of the Court on the Preliminary Objections in 1962 rejecting the South African contention that no "dispute" as would found jurisdiction under Article 7 existed as no material interests of the applicants or their nationals were involved was *res judicata* and precluded the reagitation of the same issue at the hearing on the merits.

4. Consideration of the special features of the Mandates System as an international regime in relation to the question of rights of States in the international community and the applicability of traditional principles of International Law.

5. Whether South Africa was bound by the obligations imposed upon it by the mandate and the League Covenant-survival of the mandate on dissolution of the League.

6. Whether Respondent is responsible to the United Nations and has fulfilled its obligations to the United Nations.

7. Whether the distinction between "conduct provisions" and "particular provisions" of the Mandate and the view that the League Council alone had standing in a dispute as to the former and not an individual member of the League is warranted in International Law.

8. Appropriateness of applying the rule as to standing to raise the issue in all contentious litigation before the International Court of Justice. Necessity for drawing a distinction between the degree of interest necessary for the

maintenance of an action to enforce an obligation owed to the community of States and/or the United Nations and the degree of interest necessary to request a declaration of a right or obligation owed specifically to the applicant State.

9. An evaluation of the practical results flowing from the Judgment, in particular, whether an alleged breach of the so-called "conduct provisions" of the mandate could ever be the subject of contentious litigation and a binding judgment by the Court. Is the mandate "in effect dead "?

10. Whether by pursuing a policy of *apartheid*, the Respondent has violated its obligations.

11. A study of the means by which members of the United Nations can effectively protect the well-being and development of the inhabitants of South West Africa as "a sacred trust for civilisation", in particular the legality of a revocation of the mandate granted to South Africa and the legal consequences flowing from such revocation.

12. The Court held technicality of the law rather than spirit of the law; the question of confidence in the Court; Reversal of the 1962 Judgment came about as a result of composition of the Bench; Equitable distribution of the seats on the International Court of Justice; Changes in the procedure of the Court.

13. Suggest a rightful solution—whether a fresh case be brought by another member of the League before the reconstituted Court.

CHAPTER 2

WHETHER THE COURT DISPOSED OF THE QUESTION OF APPLICANTS' INTEREST IN 1962, OR THE QUESTION IS A MATTER APPERTAINING TO MERITS ?

1. *Two phases of the case.*
2. *Distinction between a jurisdictional question and a matter appertaining to merits.*
3. *A preliminary objection—whether a jurisdictional question or a matter appertaining to merits.*
4. *Character of the 4 preliminary objections in the South West Africa cases.*
5. *1962 Judgment and the principle of 'res judicata'.*
6. *The question of compliance with the decision.*
7. *Only the decisions, but not the reasons for such decisions, to be binding.*
8. *A decision on preliminary objections is preclusive of a matter appertaining to merits.*
9. *Distinction between a preliminary objection and a matter of antecedent character.*
10. *The question of the Court's jurisdiction considering whether the Mandate still subsists.*
11. *Distinction between the question of Applicants' interest and the question of the Court's jurisdiction.*
12. *Whether the Court in 1962 decided the question of its jurisdiction or the question of admissibility of the claims ?*
13. *Whether the question of Applicants' interest was disposed of in 1962?*
14. *Character of the question of the Applicants' interest—whether a jurisdictional question or a matter appertaining to merits.*

15. *Whether the Respondent or the Applicants raised the question of Applicants' interest in their final submissions ?*
16. *Can the Court raise the question of Applicants' interest on its own motion, and deal with the same in the merits phase of the proceedings ?*
17. *Reconsideration of the 1962 Judgment of the Court.*
18. *Applicants' right to a declaratory remedy.*
19. *Issues left undecided by the Court.*
20. *Conclusions.*

1. Two phase of the Case

Issues involved in a case may be partly jurisdictional questions and partly matters appertaining to merits. In a case, like the South West Africa cases, where the respondent raises certain preliminary objections to the admissibility of the claims of the claimant party, the Court disposes of purely jurisdictional questions in the first phase, which may be called the "jurisdictional phase" of the case. Other questions are disposed of by the Court after considering the merits of the claims and counter-claims of the parties in the second phase, which may be called as the "merits phase" of the case.

2. Distinction between a jurisdictional question and a matter appertaining to merits

1966 Judgment

Separate Opinion

JUDGE MORELLI

"A decision on a jurisdictional question would have settled a purely procedural question relating, on the one hand, to the Applicants' right to institute proceedings and, on the other hand, to the Court's jurisdiction. The decision would not have touched on the merits of the case at all..." [1]

1 South West Africa (second phase), Judgment, 1966, p. 60.

Dissenting opinion

JUDGE KORETSKY

"The Rules of the Court, and the practice of the Court, do not recognise any direct line of demarcation between questions of merits and those of jurisdiction. The circumstances of the case and the formulation of the submissions of the parties are of guiding if not of decisive significance." [2]

Comments

The distinction between a jurisdictional question and a matter appertaining to merits is not always clear-cut. At best, it may be said that any issue in a case, as is relevant to deciding (1) that the applicant has a right in the case to institute proceedings, and (2) that the Court has jurisdiction in the case before it, is regarded to be a jurisdictional question, provided it is not necessary to look into the evidence presented by the parties to support their claims and counter-claims, before a decision on such issue can be made. On the other hand, where the Court finds it necessary to look into such evidence before it can make a decision on the issue, the latter is regarded to be a matter appertaining to merits.

3. A preliminary objection—whether a jurisdictional question or a matter appertaining to merits

1966 Judgment

Dissenting Opinion

JUDGE MBANEFO

"In dealing with preliminary objections the Court had two courses open to it under Article 62, paragraph 5 of the Rules of the Court. It could either give its decision on them or join the objections or any of them to the merits. The Court chose the first course and gave its decision on all the objections raised by the Respondent in their submissions..." [3]

2 *Ibid.*, p. 240.
3 I.C.J. Reports, 1962, p. 495.

Comments

A preliminary objection can either be a purely jurisdictional question, or partly a jurisdictional question and partly a matter appertaining to the merits of the case. It is a purely jurisdictional question where a decision on it can be made without going into the merits at all. On the other hand, where it is necessary to examine the merits as well, in order to arrive at a decision on a preliminary objection, the same is said to be partly a jurisdictional question and partly a matter appertaining to merits. Whereas in the former case the Court disposes of the objection in the first phase, in the latter case the Court does not make a decision in the first phase, but joins the matter to the merits for a consideration thereof and a decision thereon in the second, or the merits, phase of the case, after an examination of the merits of the claims and counter-claims of, and relevant evidence presented by, the parties.

It may be pointed out here that in its 1962 Judgment on the first phase of the South West Africa Cases, the Court did not join any of the 4 preliminary objections to the merits of the case.

4. Character of the four preliminary objections in the South West Africa Cases

1962 Judgment

"The issue of the jurisdiction of the Court was raised by the Respondent in the form of four Preliminary objections..."[4]

Separate opinion

JUDGE MBANEFO

"I agree generally with the reasons given in the Judgment of the Court, but I feel that a great deal of the argument on the first three Preliminary Objections in the

[4] I.C.J. Reports, 1962, p. 329

Judgment goes to the merits of the case. The Court is concerned essentially at this stage with the question of jurisdiction. The way in which the claims of the Applicants and the Preliminary Objections of the Respondent are framed make it difficult for the Court to avoid touching on the merits of the case. But that notwithstanding, I feel that emphasis should be on a line of reasoning that deals essentially with the issue of jurisdiction...."[5]

1966 Judgment

Dissenting opinions

JUDGE JESSUP

"The Judgment of the Court today concludes that all of these objections are to be considered as objections to the jurisdiction. As explained in the 1962 Judgment and as emphasised in the dissenting opinion of Judge Morelli, they include objections to the admissibility of the claim. The distinction is well established in the jurisprudence of the Court...."[6]

JUDGE MBANEFO

"In my separate opinion on the preliminary objections I said that a great deal of the argument on the first three preliminary objections went to the merits of the case. But the fact that it was so did not detract from the effect of the Judgment of the Court on the issues decided...."[7]

Comments

It has been pointed out in Chapter I of this Study that the Respondent raised 4 preliminary objections contesting

5 *Ibid.*, p.437.
6 South West Africa (second phase) Judgment 1966, p. 336.
7 South West Africa (second phase) Judgment 1966, p. 495.

the *locus standi* of the Applicants and the jurisdiction of the Court to hear the dispute. As is apparent from the extracts quoted above, the Court in 1962 considered these objections as raising "the issue of the jurisdiction of the Court." Judge Mbanefo, however, was of the view, in 1962 as well as in 1966, that even though the said objections are primarily jurisdictional questions, a great deal of them touched the merits of the case. It may be noted in this connection that the Court in 1962 did not hold this view, inasmuch as it did not join any of the objections of the merits of the case. In 1962, the Court treated all these objections as purely jurisdictional questions. However, Judge Jessup regards these objections as objections, not to the jurisdiction, but to the admissibility of the claim. This aspect of the matter has been considered in relation to the question of Applicants' interest, under item 12 of this Chapter.

5. 1962 Judgment and the principle of 'res judicata'

1966 Judgment

"... As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term,—whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60...."[8]

Dissenting opinions

JUDGE KORETSKY

"The (1962) Judgment has not only a binding force between the parties (Article 59 of the Statute), it is final (Article 60 of the Statute). Being final, it is—one may say—final for the Court itself unless revised by the Court

8 *Ibid.*, p. 37.

under the conditions and in accordance with the procedure prescribed in Article 61 of the Statute and Article 78 of the Rules of Court.

"In discussing the meaning of the principle of *res judicata*, and its applicability in international judicial practice, its significance is often limited by the statement that a given judgment could not be considered as binding upon other States or in other disputes. One may sometimes easily fail to take into consideration the fact that *res judicata* has been said to be not only *pro obligatione habetur*, but *pro veritate* as well. And it cannot be said that what today was for the Court a *veritas*, will tomorrow be a *non-veritas*. A decision binds not only the parties to a given case, but the Court itself. One cannot forget the principle of immutability, of the consistency of final decision, which is so important for national courts, is still more important for international courts.."[9].

JUDGE TANAKA

"The effect of *res judicata* concerning a judgment on jurisdictional matters must be confined to the point of existence or otherwise of the Court's jurisdiction. In case of an affirmative decision, the only effect is that the Court shall proceed to examine the question of the merits. To the preliminary stage must not be attached more meaning than this."[10]

JUDGE JESSUP

"The statement in Article 60 of the Statute that 'the judgment is final and without appeal' taken in conjunction with the reference in Article 59 to 'that particular case', constitutes a practical adoption in the Statute of the rule of *res judicata*, a rule or principle, cited in the proceedings

9 *South West Africa (Second phase) Judgment, 1966*, pp. 240-241.
10 *Ibid.*, p. 261.

of the Commission of Jurists which drafted the Statute of the Permanent Court of International Justice in 1920, as a clear example of a general principle of law recognised by civilised nations."[11]

And

"There is no clear distinction between "decision" and "judgment"—the terms can be used interchangeably. Under Article 60 of the Statute, the Judgment of 21 December 1962 was "final and without appeal" although (under Article 59) it "has no binding force except between the parties and in respect of that particular case." Within the meaning of Article 59, the present proceedings are in "that particular case"..."[12]

And

"I am at a loss to understand how the Court can say that the Court's disposal of these first submissions in its 1962 Judgment was merely basing itself upon an hypothesis or some sort of provisional basis. No such thought is expressed in the Court's 1962 Judgment."[13]

Comments

(This and items 7 and 8 of this Chapter are relevant to determining as to how far a decision in the first phase of a case is binding in the subsequent proceedings.)

The Court, in its 1966 Judgment, avoided pronouncing upon the applicability of the principle of *res judicata* or of Articles 59 and 60 of the Statute of the Court to the matters decided in 1962. However, Judge Koretsky and Judge Jessup, in their dissenting opinions, expressed the view that the principle of *res judicata* applied in the case, and that the 1962

11 *Ibid.*, pp. 332-33.
12 *Ibid.*, p. 332.
13 *Ibid.*, p. 336.

Judgment was final and binding not only upon the parties, but also upon the Court under the provisions of Articles 59 and 60 of the Court's Statute. In Judge Jessup's opinion "the decision of 1962 was *res judicata* on three points which the Judgment of 1966 had not reversed. They were: (a) the States qualified as "Members of the League" ; (b) there was a dispute which could not be settled by negotiation; and (c) the dispute related to the interpretation of the Mandate."[14]

Judge Tanaka, in his dissenting opinion, expressed the view that *res judicata* applied only to the Court's decision in the preliminary phase of the case, on the question of its jurisdiction. It may be pointed out in this connection that all decisions on the preliminary objections become final and binding except for the decisions on such preliminary objections as are joined by the Court to the merits of the case.

6. The question of compliance with the decision

1966 Judgment

Dissenting opinion

JUDGE JESSUP

"...It is argued, however, that there is nothing with which a party can "comply" in decisions of this character. If Article 60 and Article 94(1) were indeed to be interpreted as applying only to judgments calling for some affirmative step, the Article would be largely emasculated."[15]

And

"The Respondent's duty of compliance under Article 94(1) of the Charter with respect to the judgment of 21 December 1962, was a duty to acquiesce in the finding of

14 Pointed out by Judge M. Hidayatullah of the Supreme Court of India in his book on *The South West Africa Case*, p. 53.
15 *South West Africa (second phase) Judgment, 1966*, p. 337.

the Court and to conduct itself accordingly. By pleading to the merits, Respondent recognised and fulfilled its duty. When the Court decides that it has jurisdiction, a State which denied the correctness of the Court's decision, failed to plead to the merits and maintained that a subsequent adverse judgment on the merits was invalid, would violate its obligation under Article 94. It may be arguable that Respondent's first submission "that the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations", was inconsistent with the Judgment of 21 December 1962, but this could be a matter of interpretation on which argument was justifiable."[16]

Comments

In his dissenting opinion to the 1966 Judgment, Judge Jessup raised the question of compliance with the 1962 Judgment which, according to him, was final and binding under the provisions of Article 94(1) of the Charter. He refuted the argument that there was nothing to comply, since no part of the Judgment needed implementation. He pointed out the cases of *Corfu Channel*,[17] *United States Nationals in Morocco*,[18] and *Northern Cameroons*,[19] which were final decisions and to which Article 94(1) applied, even though no action for implementation was required in any of them. According to him, it was the Respondent's duty, in accordance with the provisions of the said Article, to conduct in accordance with, and not to assume a stand in conflict with, the 1962 findings of the Court.

16 *Ibid.*, p. 337.
17 I.C.J. Reports, 1949.
18 I.C.J. Reports, 1952.
19 I.C.J. Reports, 1953.

7. Only the decisions, but not the reasons for such decisions, to be binding

1966 Judgment

Separate opinions

JUDGE MORELLI

"It is my view that a judgment on preliminary objections, particularly a judgment which, like the judgment in question, dismisses the preliminary objections submitted by a party, is final and binding in the further proceedings. Its binding effect is however confined to the questions decided, and these can relate only to the admissibility of the claim or the jurisdiction of the Court.

On the other hand, the Court's reasoning in deciding a question submitted to it in the form of a preliminary objection is devoid of any binding effect. This limitation on the binding effect of the judgment applies to all the reasons for the decision, whatever their nature, whether of fact or of law, procedural or touching on the merits."[20]

JUDGE VAN WYK

"Inasmuch as the voting in 1962 was eight to seven it follows that, apart from all other considerations, no statement not made with the approval of all the eight majority judges and not intended by all those judges to constitute a decision could have effect as a decision of the Court."[21]

Dissenting opinions

JUDGE KORETSKY

". . . It will be recalled that Article 56 of the Statute

20 *South West Africa (Second phase) Judgment, 1966*, p. 59.
21 *Ibid.*, p. 71.

says : "*The judgment shall state the reasons on which it is based*" (italics added). These words are evidence that the reasons have a binding force as an obligatory part of the judgment, and at the same time, they determine the character of the reasons which should have a binding force. They are reasons which substantiate the operative conclusion directly ("on which it is based"). They have sometimes been called "*consideranda*". These are reasons which play a role as the grounds of a given decision of the Court—a role such that if these grounds were changed or altered in such a way that this decision in its operative part would be left without grounds on which it was based, the decision would fall to the ground like a building which has lost its foundation."[22]

JUDGE JESSUP

"The Permanent Court . . . indicated that reasons which do not go beyond the operative part (*dispositif*) are binding (*Polish Postal Service in Danzig*, P.C.I.J. Series B, No. 11, p. 29). But it is clear that not every reason or argument given by the Court in support of the decision is part of *res judicata*."[23]

Comments

Judge Morelli, in his separate opinion to the 1966 Judgment "made a distinction between the *dispositif* and the reasons for the decision."[24] He was of the view that even though a decision dismissing the preliminary objections is final and binding in further proceedings, none of the reasons (irrespective of their character) for the decision is binding. Judge van Wyk expressed the view that no statement, not intended to constitute a decision in 1962 by all the eight majority judges, is binding.

22 *South West Africa (second phase) Judgment, 1966*, p. 241.

23 *Ibid.*, p. 334.

24 Pointed out by Judge M. Hidayatullah of the Supreme Court of India, in his book on *The South West Africa Case*, p. 44.

On the other hand, Judge Koretsky and Judge Jessup, in their dissenting opinions, pointed out that even though every reason given in the judgment is not binding, the reasons upon which the Court bases its conclusions, and without which the decision would be left without any support, are binding. Judge Koretsky calls such reasons as "*consideranda*". Judge Jessup also cited the opinion of Judge Anzilotti in Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, pp. 23-7, which ran as follows:

> "When I say that only the term of a judgment (*le dispositif de l'arret*) are binding, I do not mean that only what is actually written in the operative part (*dispostif*) constitutes the Court's decision. On the contrary, it is certain that it is almost necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*."

Judge Jessup also pointed out the case of *Polish Postal Service in Danzig*,[25] in which a similar view was expressed. This also seems to be the correct position.

8. A decision on preliminary objections is preclusive of a matter appertaining to merits

1966 Judgment

> ". . . The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection. When preliminary objections are entered by the defendant party in a case, the proceedings on the merits are, by virtue of Article 62, paragraph 3, of the Court's Rules, suspended. Thereafter, and until the proceedings on the merits are resumed, the preliminary objections having been rejected, there can be no decision finally

25 P.C.I.J., Series B, No. 11, p. 29.

determining or pre-judging any issue of merits. It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the merits, therefore, ranks simply as part of motivation of the decision on the preliminary objection, and not as the object of that decision. It cannot rank as a final decision on the points of merits involved."[26]

Separate opinion

JUDGE VAN WYK

"... a preliminary objection is not intended to, and is not capable of giving rise to a binding judgment on the issues of merits involved.."[27]

Dissenting opinions

JUDGE TANAKA

"...What was decided in a finding in the perliminary objection proceedings as a basis of jurisdiction, must not be prejudicial to the decision on the merits, therefore may not have binding force *vis-a-vis* the parties..."[28]

JUDGE JESSUP

"Paragraph 3 of Article 62 of the Rules of Court provides : "Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended..." On the basis of this provision it is argued that if the Court is delivering

26 *South West Africa (Second phase) Judgment, 1966*, p. 37.
27 *Ibid.*, p. 69.
28 *Ibid.*, p. 261.

judgment on a preliminary objection-whether to jurisdiction or to admissibility-touches on any matter which pertains or appertains to the merits, what it says is just *obiter dicta*. This argument is based on a misconception of the Rule, as its history reveals. It was in the revision of the Rules in 1936 that there was inserted the provision that "proceedings on the merits shall be suspended." Before that, the Rules contained no such provision. The discussion of the matter in the Court shows that the entire concern was focussed on the problem of the time-limits which the Court would already have fixed for the main proceedings..."[29]

And

"It is perfectly clear that the provision of the Rule in question was purely a matter of administrative procedure having to do with the setting of time-limits and was not conceived to have the substantive implications now sought to be attributed to it. The Court's Judgment today pressed the new theory further than it has been pressed before; it is now pressed too far and the historical origin of the Rule must be recalled."[30]

JUDGE MBANEFO

"...The fact that the proceedings were so suspended did not and could not in my view affect the binding force of the 1962 Judgment (which has not been challenged) on the issues raised in the submissions and decided by the Court."[31]

29 *South West Africa (Second phase) Judgment*, p. 334.
30 *Ibid.*
31 *Ibid.* p. 494.

And

"...In my separate opinion on the preliminary objections I said that a great deal of the argument on the first three preliminary objections in the Judgment went to the merits of the case. But the fact that it was so did not detract from the effect of the Judgment of the Court on the issues decided. It only meant that whatever the Court found in that phase of the proceedings should not prejudice its findings subsequently on any issue relevant to the merits..."[32]

Comments

In its 1966 Judgment, the Court expressed the view that a decision on a preliminary objection cannot be regarded to be binding in respect of a matter appertaining to the merits, inasmuch as in pursuance of the provisions of Article 62 (3) of Court's Rules, the proceedings on the merits remain suspended. As such, no issue of merits can be said to have been decided by the 1962 Judgment. Judge van Wyk, in his separate opinion, agreed with this view and pointed out that there was actually an order, dated 5th December 1961, suspending the proceedings on the merits under the provisions of Article 62 (3) of the Court's Rules. He also quoted the decisions in *Mavrommatis Palestine Concessions Case*[33] and *Polish Upper Silesia Case*[34] where the aforesaid view was expressed as follows:

"...the Court cannot...in any way prejudice its future decision on merits."

And

"Even if this enquiry involves touching upon subjects belonging to the merits of the case nothing which the

32 South West Africa (second phase) Judgment 1966, p., 496.
33 P.C.I.J., Series A, No. 2, p. 13.
34 P.C.I.J., Series A, No. 6, p. 15.

Court says in the present Judgment can be regarded as restricting its entire freedom to estimate the value of any arrangements by either side on the same subject during the proceedings on the merits."

Judge Tanaka, in his dissenting opinion, seems to agree with this view.

On the other hand, Judge Jessup, in his dissenting opinion, traced the history of insertion of the provision "proceedings on the merits shall be suspended" in Article 62 (3) of the Court's Rules, and pointed out that the said provision referred to the suspension of "the obligation of the parties to file a particular written Memorial" within a stated time. This was a rule of admininistrative procedure which gave effect to the principle *in excipiendo reus fit actor* (the defendant by his plea may make himself a plaintiff). He criticised the Court for drawing substantive implications from the Rule and making it a basis for a new theory as regards the binding effect of the decisions, while ignoring the historical origin of the Rule. According to Judge Jessup, the binding effect of a decision is not effected in any manner by Article 62 (3) of the Court's Rules. Judge Mbanefo, in his dissenting opinion, agreed with this view, subject to the qualification that a finding on any matter of merits is not prejudiced by a decision on preliminary objection in the first phase of the case. This also seems to be the correct view.

9. Distinction between a preliminary objection and a matter of antecedent character

1966 Judgment

"The Parties having dealt with all the elements involved, it becomes the Court's duty to begin by considering those questions which had such a (i.e. antecedent)

35 Pointed out by Judge M. Hidayatullah of the Supreme Court of India, in his book on *the South West Africa Case*, p. 55.

character that a decision respecting any of them might render unnecessary an enquiry into other aspects of the matter...."[36]

And

"...there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of Applicants' standing in the present phase of the proceedings,—not that is to say of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of merits of the case, of their legal right or interest regarding the subject-matter of of their claim, as set out in their final submissions."[37]

Separate opinion

JUDGE MORELLI

"It must be observed that as between the various questions all of which concern the merits, there is no strict order of logic, the order to be followed in any particular case in dealing with the various questions of merits is dictated by reasons of what might be called economy, which counsel the use of the simplest means of reaching the decision.."[38]

Comments

As pointed out before, the jurisdictional questions involved in a case are inquired into and determined in the first phase of the case. Preliminary objections also are inquired into and determined by the Court in the first phase of the case, except for such of them as are joined to the merits of the case. On the

36 *South West Africa (Second phase) Judgment, 1966* p. 18.
37 *Ibid.*
38 *Ibid.* p. 65.

other hand, all the matters appertaining to merits are inquired into and determined in the second phase, *viz.*, the merits phase of the case. Even though, as pointed out by Judge Morelli, there is no particular order in which the issues appertaining to merits are required to be dealt with, the Court may adopt any such order of dealing with them, as is dictated by the considerations of "economy" and is found to be "the simplest means of reaching the decision."

Of the various matters appertaining to merits, there may be one or more of them which may have a fundamental character, so that an inquiry into, and determination of, such matter or matters dispenses with the necessity of an inquiry into, and determination of, other matters of merits. Any matter having the aforesaid character is called an "antecedent question." Such a question is usually a fundamental issue of the case, a determination whereof may preclude a determination of other aspects of the case. Where the Court treats a question to be an antecedent question, it proceeds to consider and determine the same before inquiring into other matters. Justice Hidayatullah of the Supreme Court of India points out that in the 1966 Judgment of the Court "two questions were stated to go to the root of the matter: firstly, whether the Mandate still subsisted, and, secondly, whether the Applicants had any legal right or interest in the subject-matter of their claim. The second question was considered more fundamental than the first and was taken up for consideration."[39]

10. **The question of the Court's jurisdiction considering whether the Mandate still subsists**

1950 ADVISORY OPINION (Unanimously)

"...South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920."[40]

39 In his book on *The South West Africa Case*, p. 38.
40 *International Status of South West Africa, Advisory Opinion* : I.C.J. Report 1950, p. 143.