continue to turn a deaf ear to the Council's admonitions. In such an event the only course left to defend the interests of the inhabitants in order to protect the sacred trust would be to obtain an adjudication by the Court on the matter connected with the interpretation or the application of the Mandate. But neither the Council nor the League was entitled to appear before the Court. The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication....."[14]

And

".....The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory towards the inhabitants of the Territory or towards the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both towards the inhabitants of the mandated Territory, and towards the League of Nations and its Members."[15]

14 *South West Africa Cases, Preliminary Objections, Judgment*, I.C.J. Reports, 1962, at p. 337.

15 *Ibid.*, at p. 343.

Separate opinion

JUDGE BUSTAMANTE

".....Member States, as integral parts of the League itself, have possessed a direct legal interest in the protection of under-developed peoples. It is no doubt on the basis of these principles that the Mandate Agreement, in its Article 7, conferred upon Member States, in their individual capacity, the right to invoke the compromissory clause to require of the Mandatory a correct application of the Mandate."[16]

1966 Judgment

"The real position of the individual members of the League relative to the various instruments of mandate was a different one. They were not parties to them ; but they were, to a limited extent, and in certain respects only in the position of deriving rights from these instruments...Apart from the jurisdictional clause,...mention of the members of the League is made only in the "special interest" provisions of these instruments. It is in respect of these interests alone that any direct link is established between the mandatories and the members of the League individually. In the case of the "conduct" provisions, mention is made only of the mandatory and, where required, of the appropriate organ of the League. The link in respect of these provisions is with the League or League organs alone."[17]

And

".....It is a court of law, and can take account of moral principles only in so far these are given a sufficient expression in legal form...

16 *Ibid.*, at p. 380.

17 *South West Africa (second phase) Judgment, 1966*, at p. 28.

"Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest-in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character."[18]

And

"In the present case, that subject-matter includes the question whether the Applicants possess any legal right to require the performance of the "conduct" provisions of the Mandate. This is something which cannot be pre-determined by the language of a common-form jurisdictional clause such as Article 7, paragraph 2, of the Mandate for South West Africa. This provision, with slight differences of wording and emphasis, is in the same form as that of many other jurisdictional clauses. The Court can see nothing in it that would take the clause outside the normal rule that, in a dispute causing the activation of a jurisdictional clause, the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it, and must therefore be established *aliunde vel aliter*. Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal."[19]

And

".....The Court does not, however, consider that the word "whatever" in Article 7, paragraph 2, does

18 *South West Africa (second phase) Judgment, 1966,* at p. 34.

19 *Ibid.*, at p. 39.

anything more than lend emphasis to a phrase that would have meant exactly the same without it ; or that the phrase "any dispute" (whatever) means anything intrinsically different from "a dispute"; or that the reference to the "provisions" of the Mandate, in the plural, has any different effect from what would have resulted from saying "a provision..."[20]

And

"... ... ... it must not be forgotten that it was simultaneously with the missionary clause that the jurisdictional clause was introduced ; and that at the time much importance was attached to missionary rights. . "[21]

And

"Under this system, viewed as a whole, the possibility of serious complication was remote ; nor did any arise. That possibility would have been introduced only if the individual members of the League had been held to have the rights the Applicants now contend for. In actual fact, in the 27 years of the League, all questions were, by one means or another, resolved in the Council ; no request was made to the Court for an advisory opinion ; so far as is known, no member of the League attempted to settle direct with the Mandatory any question that did not affect its own interests as a State or those of its nationals, and no cases were referred to the Permanent Court under the adjudication clause except the various phases of one single case (that of the *Mavrommatis concessions*) coming under the head of "special interests." ... ...[22]

20 *South West Africa (second phase) Judgment, 1966,* at pp. 41 and 42.

21 *Ibid.*, at p. 44.

22 *Ibid.*, at p. 45.

And

"... ... Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present, nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute". [23]

Separate opinion

JUDGE MORELLI

"These collective interests are not protected by the provisions in question by means of rights conferred on the different States concerned, so that each of those States could individually require the prescribed conduct; this would give rise to possibility of conflicting demands on the part of two or more States all relying on the same provision of the Mandate. Such an eventuality must be ruled out by the very fact that the right is conferred not on the States Members in their individual capacities, but either on the League of Nations as a single person distinct from its component States, or if the League of Nations is not accepted as having legal personality, then on the States Members as a group and not in their individual capacities. Under the second of these two concepts it would be a right the exercise of which is organized in a certain way, so that it may be exercised by its holders only collectively, that is to say through corporate organs." [24]

23 *South West Africa (second phase) Judgment, 1966*, at p. 47.

24 *Ibid.*, at pp. 64 and 65.

Dissenting opinions

JUDGE WELLINGTON KOO

"It should be stated, in addition, that the same adjudication clause with its broad, comprehensive language and a practically identical text, is embodied in all the 'B' and 'C' mandates, notwithstanding the marked differences between the great variety of national or material interests of the Member States, as in the case of the Mandate for Palestine, and the one single kind of national or individual interests relating to missionaries and their freedom to practise their calling, as in the case of the Mandate for South West Africa (Article 5). This fact would seem to support the view that Article 7(2) of the latter Mandate, like similar provisions in the other mandates of 'B' and 'C' categories, is intended to provide a means primarily for the exercise by League Members of their legal right or interest, through the judicial process, in the performance of the mandate by the mandatory as to its obligations towards the inhabitants of the mandated territory and towards the League of Nations, and only secondarily for the judicial protection of the national or material interests of the Members of the League of Nations.

"There is yet another fact which throws light on the point of issue under consideration. The order in which the various obligations of the Mandatory are stipulated in the Mandate instrument for South West Africa is not without significance ... ... It is therefore not unreasonable to infer from this arrangement the varying degrees of importance which the authors of the instrument attached in their minds to the different categories of obligations of the Mandatory and to conclude that the fact that the compromissory provision with its all-embracing language comes at the end, was intended to apply to all obligations

undertaken by the Mandatory and not merely to those under Article 5, thus further confirming the comprehensive scope and purport of Article 7, paragraph 2, as to "any dispute whatever ... ... relating to the interpretation or the application of the provisions of the Mandate". [25]

And

"The fact that only one case was brought to the Permanent Court of International Justice by any Member of the League of Nations during the 25 years of its existence under an adjudication clause similar to Article 7 of the Mandate for South West Africa (Article 26 of the Palestine Mandate) in respect of alleged injury to the material interests of a national of the Applicant and that no recourse was ever made to the Court to invoke its protection and ensure due observance by the mandatory Power of its substantive obligations under a given mandate towards the inhabitants of the mandated territory does not necessarily prove that individual League Members had no legal right or interest in such observance ... ... " [26]

JUDGE KORETSKY

"These general interests in relation to a 'C' mandate might be only the interest of protecting the indigenous peoples, which were (and are) under the Mandate. And if the judgment of the Court insists that the Applicants had to establish their own legal interests in the subject-matter of their claims, one might say that the general interest in a proper observance of the provisions of the Mandate became the interest of any Member of the League on his own, as his proper interest.

25 *South West Afri a (second phase) Judgment, 1966,* at pp. 221 and 222.

26 *Ibid.*, at p. 228

"This is confirmed by what might appear to be merely a detail ; Article 7 (2) of the Mandate puts the words the "provisions of the Mandate" in the plural—that is to say, the Applicants possessed the right to apply to the Court on questions relating to the interpretation or the application of all provisions of the Mandate (and not merely relating to provision 5 (the missionaries clause) " [27]

And

"And to prove the Applicants' right to apply to the Court on this ground, it is not necessary to assert that the Mandate was established "on behalf of the Members of the League in their individual capacities" (Judgment, para. 20), or that the Applicants (as former Members of the League) were separate parties to the instrument of mandate as such, that they had a status, analogous to that of a beneficiary or—which is much the same—that they were *tertii in favourem* of whom the Mandate was instituted. To lay down these conditions would be beside the point as the Applicants themselves did not rest their right to invoke the jurisdiction of the Court upon such grounds.

"Article 7 (2) does not call for such conditions. Its wording is quite clear to anyone who is not seeking to read into it what it does not contain ... ... " [28]

JUDGE TANAKA

"The fact that international law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other "material" or so-called "physical" or "tangible" interests was exhaustively pointed out by Judge Jessup in his separate opinion

27 *South West Africa (second phase) Judgment, 1966,* at p. 247.

28 *Ibid.*, at p. 248.

in the *South West Africa Cases* (*1962 Judgment & I C J. Reports 1962*, pp. 425—428). As outstanding example of the legal interests of States in general humanitarian causes, the international efforts to suppress the slave trade, the minorities treaties, the Genocide Convention and the constitution of the International Labour Organization are cited.

"We consider that in these treaties and organizations common and humanitarian interests are incorporated. By being given organizational form, these interests take the nature of "legal interest" and require to be protected by specific procedural means.

"The mandates system which was created under the League presents itself as nothing other than an historical manifestation of the trend of thought which contributed to establish the above-mentioned treaties and organizations. The mandates system as a whole, by incorporating humanitarian and other interests, can be said to be a "legal interest". [29]

And

"One of the arguments in denial of the Applicants' legal interest in the Respondent's observance of the conduct clauses is that Applicants do not suffer any injuries from non-observance of the conduct clauses. The Applicants, however, may not suffer any injuries in the sense that their own State interests or the interests of their nationals are injured. The injuries need not be physical and material, but may be psychological and immaterial, and this latter kind of injuries may exist for the Applicants in the case of non-observance by the Respondent of the conduct clauses.

29 *South West Africa (second phase) Judgment, 1966*, at p. 252.

"The supreme objectives of the mandates system, namely the promotion of the well-being and social progress of the inhabitants of the Territory mentioned in Article 2, paragraph 2, of the Mandate, inspite of their highly abstract nature, cannot be denied the nature of a legal interest in which all Members of the League participate". [30]

JUDGE JESSUP

"The standing of Applicants in the present cases rests squarely on the right recognized in paragraph 2 of Article 7 of the Mandate, which is a right appertaining to many States. But it must be recognized that Applicants as African States, do in addition have a special interest in the present and future of the mandated territory of South West Africa and its inhabitants.... ...

"The impact on other African States south of Sahara of racial conflict and the practice of *aparthied* in South West Africa could be, and is, just as great if not greater than certain impacts which Respondent concedes....."[31]

And

"Since it is agreed in the Judgment of the Court that Members of the League might invoke the adjudication clauses of the mandates in order to assure observance of the provisions directed to the maintenance of economic equality, and since these same provisions were designed also for the benefit of the indigenous populations, it is clear that arguments which seek to dilute the reach of the adjudication clause by the theory that the mandatories would never have agreed to a system which might subject

30 *South West Africa (second phase) Judgment, 1966*. at p. 253.

31 *Ibid.*, at p. 381.

them to litigious harrassment, is ill founded and cannot be accepted. It may be well to recall at this point what has been described above, namely that the so-called "missionary" clause was more in the nature of a guarantee for the welfare of the indigenous populations than for the benefit of nationals of Members of the League".[32]

And

"I must repeat, as indicated above, that the municipal law analogy which I have been discussing is far from perfect and the differences in the international law situation must be clearly noted. I agree that there is no generally established *actio popularis* in international law. But international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest".[33]

JUDGE PADILLA NERVO

"I believe that the Applicants' legal interest in the performance by the Mandatory of its obligations under the Mandate derives not only from the spirit, but from the very terms of the Covenant and the Mandate, and is clearly expressed in Article 7 (2)".[34]

JUDGE MBANEFO

"The League may, in a sense, therefore, be likened to a members club (and here I have in mind the common law concept of such clubs). Any member of a club can sue for the club's properties and can by appropriate action restrain the officers of the club from acting contrary to the aims and purposes of the club. A member can even

32 *South West Africa (second phase) Judgment, 1966,* at p. 384.
33 *Ibid.,* at pp. 387 and 388.
34 *Ibid* . at p. 453.

proceed against an agent of the club or a third person in order to protect or recover the club's property where the officers of the club fail to do so...If the analogy of a member's club is in that limited sense accepted, I do not see anything extraordinary in the provisions of Article 7 (2) of the Mandate allowing a member of the League to refer to Court any dispute with the Mandatory, whether or not it relates to what the Court calls the "conduct" or "special interests" provisions relating to the interpretation and application of the provisions of the Mandate, especially as by Article 34 of the Court's Statute the League, not being a State, could itself be a party to an action in the International Court....."[35]

And

"On the ground that the text of Article 7 (2) is clear, it is not in my view necessary to have recourse to the *travaux preparatoires* in interpreting it. It may be said that inspite of the views expressed above, the courts have in most cases had recourse to *travaux preparatoires* in interpreting provisions of treaties, but where they have done so the purpose has been to support rather than contradict the plain words of the text".[36]

And

"The right to invoke the compromissory clause against a party implies or includes the right to recover on the claim if the evidence justifies it. The Applicant in such a case does not have to establish damage or prejudice to its material interests in order to succeed, unless it was claiming damages. All it needs to prove is that it belongs to the class of States to whom the right to bring the action is given in the compromissory clause".[37]

35 *South West Africa (second phase) Judgment, 1966,* at pp. 492 and 493.
36 *Ibid.,* at p. 501.
37 *Ibid.,* at p. 502.

And

"It has been said that nowhere in the Mandate was it stated that members of the League should have the right of protecting the Mandate. The answer is that it does not need to be so stated. The existence of such a right is inherent in the very act of creating the Mandate on behalf of the League and Article 7 (2) emphasizes the existence of such a right in the members of the League. It seems to me that this is a logical reason for drafting Article 7 (2) in such wide terms. Article 7 (2) of the Mandate as a provision of the Mandate should be interpreted in a manner to ensure the purpose of the Mandate. To do otherwise would be to corrupt both the letter and spirit of the Article".[38]

Comments

The Court, in its 1966 Judgment, pointed out that the jurisdictional clause, as embodied in Article 7 (2) of the South West Africa Mandate, "with slight differences of wording and emphasis, is in the same form as that of many other jurisdictional clauses," and expressed the view that the legal right or interest of a League member, under the said clause, was confined to the provisions of Article 5, which granted to every League Member a substantive right" relating to missionaries and their freedom to practise their calling." (See Annexure II to this Study). The Court also regarded it material that the jurisdictional clause was introduced simultaneously with the missionaries clause. On the other hand, according to Judge Wellington Koo, the fact that the same jurisdictional clause was introduced in 'B' and 'C' mandates, which differ in the scope and extent of their provisions relating to national rights, proves that the clause "is intended to provide a means primarily for the exercise by the League Members of their legal right

38 *Ibid.*, at pp. 504 and 505.

or interest, through the judicial process, in the performance of the mandate by the mandatory as to its obligations towards the inhabitants of the mandated territory and towards the League of Nations, and only secondarily for the judicial protection of the national or material interests of the Members of the League of Nations."

Further, according to the 1966 Judgment, the general rule in regard to activation of a jurisdictional clause was that "the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it—and must therefore be established *aliunde vel olitor*". In this regard, Judge Koretsky said in his dissenting opinion, that "If one wants to differentiate in these cases between a right to invoke the jurisdiction of the Court and the substantive right (which underlies the claims), it is practically impossible to do so as in these cases the substantive right of the Applicants, their legal right or interest in the subject-matter of the claims, one may say, coincides with their right to submit to the Court their dispute relating to the interpretation or the application of the provisions."[39] Judge Jessup pointed out that the Court had not produced any authority in support of its distinction between the right to activate the Court and the substantive legal right or interest of the Applicants. He regarded the distinction to be utterly futile.[40] According to Judge Mbanefo, the right to activate the Court includes the right to obtain from the Court a decision on the interpretation and application of the Mandate, without having to show "damage or prejudice to its material interests". All that was necessary to prove, in such a case, was that the applicant belongs to the category of States, which are authorized under the jurisdictional clause to bring such a dispute

39 *South West Africa (second phase) Judgment, 1966*, at p. 248.

40 *Ibid., at* p. 383.

before the Court. He also quoted Rosenne,[41] who had expressed the view that—

> ".....Where such a treaty contains a compromissory clause, the jurisdiction may be invoked in accordance wlth that clause even if material interests of a concrete character cannot be shown by the applicant State..."

Moreover, the Court in its 1950 Advisory Opinion, and Judge Sir Arnold McNair in his separate opinion to the said opinion, and Judge Wellington Koo, Judge Jessup and Judge Padilla Nervo in their dissenting opinions to the 1966 Judgment, expressed the view that Article 7 (2) of the Mandate conferred a substantive legal right on every League Member to refer to the Court for adjudication, any dispute with the Mandatory concerning the interpretation or application of the provisions of the Mandate. According to Judge Jessup, the said right had been squarely recognised in Article 7 (2). Judge Padilla Nervo believed "that the Applicant's legal interest in the performance by the Mandatory of its obligations under the Mandate derives not only from the spirit, but from the very terms of the Covenant and the Mandate, and is clearly expressed in Article 7 (2)."

The Court, in its 1966 Judgment, also expressed the view that the individual League Members were not parties to the Mandate ; that their direct link with the Mandatory's obligations is established only in respect of the "special interest" provisions of the Mandate ; and that in respect of the "conduct" provisions, the link is between the League and the Mandatory's obligations. Further, it pointed out the complication that might arise if the individual League Members had the right to bring the Mandatory before the Court in respect of disputes concerning the administration of the mandated territory or other "conduct" provisions of the mandate. Judge Morelli also referred to the possibilility of conflicting demands by different League Members arising against the Mandatory,

41 *South West Africa (second phase) Judgment, 1966*, at p. 502.

if each League member is held to have a right to resort to the Court under Article 7 (2). According to him, only the League or else its members "as a group and not in their individual capacities' had such a right. We may point out in this connection, that the Court in its 1962 Judgment, had taken the opposite view and had pointed out the necessity of conferring the right on the individual League Members in view of the facts that (i) the League or any of its organs could only seek an advisory opinion from the Court, and not a judgment which would be binding upon the Mandatory, and (ii) the League (not being a State) was not competent to appear before the Court in contentious proceedings leading to a binding decision in a matter concerning any mandate. In the circumstances, the "only effecitve recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication." Judge Mbanefo compared the League to a Member's Club, in which each member was authorised to bring a suit against the officers of the club as also against a third party, and pointed out that Article 7 (2) was not based on any distinction between the "conduct" and "special-interest" provisions of the Mandate. Judge Korestky posed the question : Whether it was something strange, at the time of drafting the mandates, to entrust the right to apply to the Court in defending the mandate to the individual League members ?[42] He cited an excerpt from a pamphlet of the League : *La Cour permanente de Justice internationale* (Geneva, 1921, p. 19) : (*Translation*)

> "The question has been raised whether the principal organs of the League—above all, the Council—should be able, as such, to be a party to a dispute before the Court. This idea has, however, been discarded both by the Council at its Brussels meeting and by the

42 *South West Africa (second phase) Judgment, 1966*, at p. 246.

Assembly. On the other hand, it is understood as is expressly stated in the report on the Statute approved by the Assembly, that groups of States may appear as a party. Consequently, there is nothing to prevent the individual States represented at a given moment on the Council from instituting an action collectively, but not as the Council of the League. This possibility may prove to be of special value when it comes to enforcing certain stipulations of the treaties concerning the protection of racial, religious, etc. minorities."

Judge Bustamante, in his separate opinion to the 1962 Judgment, expressed the view that the League Members "possessed a direct legal interest in the protection of underdeveloped peoples", "as integral parts of the League itself"; and that Article 7 of the Mandate recognised such right of each individual League member. Judge Koretsky, in his dissenting opinion to the 1966 Judgment, criticised the Court's view that the inividual League Members were not parties to the Mandate and had no direct link with the Mandatory's obligations in respect of conduct of the Mandate. According to him, it was not necessary for the Applicants to be parties to the Mandate, in order to be able to exercise their right to apply to the Court. Judge Jessup regarded as ill-founded and unacceptable, the argument that in case the individual League members were given the aforesaid right, the Mandatory could be subject to "litigious harrassment." He also criticised the so-called distinction between the "conduct" and "special interest" provisions of the Mandate made by the Court in respect of the Applicants' right to apply to the Court, and expressed the view that the so-called "special interest" provisions, such as those relating to "the maintenance of economic equality" and freedom of missionaries were "more in the nature of a guarantee for the welfare of the indigenous populations—than for the benefit of nationals of Members of the League." Judge Wellington Koo reviewed the order in

which the Mandatory's obligations were stipulated in the Mandate and came to the conclusion that the scope and purport of Article 7 (2) covered all of the Mandatory's obligations under the Mandate, "and not merely those under Article 5". It may also be pointed out here that the provisions of Article 7 (2) of the Mandate did not say that an individual League member would not have the right of resort to the Court in respect of the so-called "conduct" provisions of the Mandate. Also the Court did not state any legal authority for denying the right of a League Member to enforce such provisions.

The Court, in its 1966 Judgment, regarded the Applicants' interests in the conduct of Mandate as merely moral or humanitarian interests, which might "constitute the inspirational basis for rules of law," but which in themselves do not "amount to rules of law", and expressed the view that it, being a Court of law "can take account of moral principles only in so far as those are given a sufficient expression in legal form." In this connection, Judge Tanaka pointed out that in respect of recognition of legal interests of States in general humanitarian causes, the Mandates System was not an exception, but was merely a "historical manifestation of the trend of thought" of legal recognition of humanitarian and other interests in many other treaties, such as the minorities treaties, the Genocide Convention, the Constitution of the International Labour Organization, and "the international efforts to suppress slave trade." "By being given organizational form, these interests take the nature of "legal interests" and require to be protected by specific procedural means."

The Court, in its 1966 Judgment, expressed the view that a recognition of Applicants' legal right in respect of the conduct of the Mandate would amount to "*actio popularis* and that "although a right of this kind may be known to certain municipal systems of law, it is not known to inter-

national law as it stands at present : nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute." But, as pointed out above, a State's legal right and interest in matters of general interest has been legally recognized in many treaties including the Mandate. Judge Jessup pointed out that the "international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest." Moreover, in the present cases, the Applicants had a special interest too in the administration of the territory and treatment of its inhabitants by the Mandatory, inasmuch as the Applicants are bound to experience a great political impact on themselves of the Mandatory's policy of *aparthied* and the racial conflict arising therefrom. Judge Tanaka expressed the view that the legal injury to the Applicants "need not be physical and material, but may be psychological and immaterial, and this latter kind of injuries may exist for the Applicants in the case of non-observance by the Respondent of the conduct clauses." Further, both Judge Koretsky and Judge Tanaka expressed the view that the "general interests" of the League members in the "promotion of well-being and social progress of the inhabitants of the Territory" and the proper observance by the Mandatory of the provisions of the Mandate, had been legally recognized in the provisions of the Covenant and the Mandate, including Article 7 (2).

The Court, in its 1966 Judgment, also pointed out that all the questions concerning mandates were resolved in the Council ; that the latter body never sought an advisory opinion from the Court on any such question ; and that only one case, relating to *Mavrommatis Concessions*, was referred for adjudication to the Permanent Court by an individual League member, and that too concerning an interest, which falls within the category of "special interest." However, according to Judge Wellington Koo, the fact that only one

case was referred to the Permanent Court by a League Member during 25 years of the League's existence "does not necessarily prove that the individual League Members had no legal right or interest in" the observance of the provisions of the Mandate by the Mandatory.

In regard to interpretation of the provisions of Article 7 (2), the Court in its 1962 Judgment said that the "language used is broad, clear and precise ; it gives rise to no ambiguity and it permits no exception", and that it covers disputes relating to interpretation and application of all or any provision of the Mandate (and not the so-called "special interest" provisions alone). According to the Court, the language being clear and unambiguous, no other interpretation can be placed upon them. On the other hand, the Court, in its 1966 Judgment did not think "that the reference to the "provisions" of the Mandate, in the plural, has any different effect from what would have resulted from saying "a provision."

Judge Koretsky, in his dissenting opinion, disagreed with this and expressed the view that the use of the word "provisions" (in plural) proved the Applicants' right to apply to the Court on questions relating to the interpretation or the application of all provisions of the Mandate "and not merely the provisions of Article 5. Judge Koretsky and Judge Mbanefo also emphasized that the language of Article 7 (2) is clear and unambiguous. Judge Mbanefo expressed the view that inasmuch as text of the said Article was clear, it was unnecessary to have recourse to *travaux preparatoires in* interpreting the same ; and that the Courts have recourse to *travaux preparatoires* only with a view "to support rather than contradict the plain words of the text." In reply to the argument that the Mandate nowhere "stated that the members of the League should have the right of protecting the Mandate", he said that this was absolutely unnecessary in view of the drafting of Article 7 (2) in wide terms which cover disputes relating to any of the provisions of the Mandate. He also

said that the said Article "should be interpreted in a manner to ensure the purpose of the Mandate. To do otherwise would be to corrupt both the letter and spirit of the Article."

In regard to interpretation of the provisions of Article 7 (2), it is interesting to note the views of Mr. R. Ballinger expressed in his article published in *The South Africa Law Journal, 1964*. He said at p. 46 :

> "The broad, clear and precise language (of Article 7) made it obvious that Members of the League had been understood to have a legal interest in the observance of its obligations towards the inhabitants of of South West Africa by the Mandatory".[43]

3. Legal right or interest of Applicants on dissolution of the League

1950 Advisory opinion

> "According to Article 7 of the Mandate, disputes between the mandatory State and another Member of the League of Nations relating to the interpretation of the application of the provisions of the Mandate, if not settled, by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions".[44]

Separate opinions

JUDGE SIR ARNOLD McNAIR

> "Although there is no longer any League to supervise the exercise of the Mandate, it would be an error to

43 *South West Africa (second phase) Judgment, 1966*, at p. 242.

44 *International Status of South West Africa, Advisory Opinion;* I. C. J. Reports, 1950, at p. 138.

> think that there is no control over the Mandatory. Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate....."[45]

JUDGE READ

> "...I regard as significant the survival of the rights and legal interests of the Members of the League...the same reasons which justify the conclusion that the Mandate and the obligations of the Union were not brought to an end by the dissolution of the League, lead inevitably to the conclusion that the legal rights and interests of the Members, under the Mandate, survived. If the obligations of the Union, one of the Mandatories on behalf of the League, continued, the legal rights and interests of the Members of the League must, by parity of reasoning, have been maintained".[46]

1962 Judgment

> "...besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision.

> "...the Court sees no valid ground for departing from the conclusion reached in the Advisory Opinion of 1950 to the effect that the dissolution of the League of Nations

45 *Ibid.*, at p. 158.

46 *Ibid.*, at p. 166.

has not rendered inoperable Article 7 of the Mandate. Those States who were Members of the League at the time of its dissolution continue to have the right to invoke the compulsory jurisdiction of the Court, as they had the right to do before the dissolution of the League. That right continues to exist for as long as the Respondent holds on the right to administer the territory under the Mandate".[47]

1966 Judgment

"Next, it may be suggested that even if the legal position of the Applicants and of other individual members of the League of Nations was as the Court holds it to be, this was so only during the lifetime of the League and that when the latter was dissolved, the rights previously resident in the League itself, or in its competent organs, devolved, so to speak, upon the individual States which were members of it at the date of its dissolution. There is, however, no principle of law which would warrant such a conclusion....."[48]

Separate opinions

JUDGE MORELLI

"One of the grounds upon which the claim could also have been rejected is the non-existence of obligations owed by the Mandatory, possibly because of the lapse of the Mandate. Such a ground might even be considered as more radical in nature than the non-existence of rights pertaining to the Applicants; in other words, it might be considered that the question of the existence of obligations owed by the Mandatory is a preliminary question with respect to the question whether such obligations, if

47 *South West Africa Cases, Preliminary Objections, Judgment,* I. C. J: Reports, 1962, at pp. 337 and 338.

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

found to exist, are owed to the Applicants or to some other person or persons. For it might be considered that it is only in respect of an actual existing obligation that it is possible to enquire into the identity of the holder of the rights corresponding to obligation".[49]

JUDGE VAN WYK

"It is common cause that Article 7 can no longer apply, and Applicants can no longer hold any rights they may have had as Members of the League, unless the words "Members of the League of Nations" in the Mandate are given a meaning which includes ex-Members of the League who were Members at the time of its dissolution....."[50]

And

"There is no evidence to justify an inference that the authors of the mandates system intended that a State which has ceased to be a member of the League should retain rights conferred on it as a member of the League, and there is nothing unreasonable in a conclusion that a State which has lost the qualification entitling it to the enjoyment of a right, has lost that right. Whenever a right is terminated it would be possible to say that what would have constituted a violation of an obligation one day would be permissible the following day, but this is no reason for saying that the right has not come to an end....."[51]

Dissenting opinion

JUDGE WELLINGTON KOO

"This League session and the resolution it passed on the mandates has more than ordinary meaning and

49 *Ibid.*, at p. 65.

50 *Ibid.*, at p. 72.

51 *Ibid.*, at p. 75.

significance with reference to the question now under consideration.....the pledges of the various mandatory Powers to continue to administer their respective mandates in accordance with the obligations stipulated thereunder as for as possible were in effect made not so much to the Assembly as a body as to the member States. For while the latter were meeting collectively as the Assembly, it was the last time they assumed this character. The dissolution of the League of Nations was by its own resolution to take effect the day following and with it the Assembly, as well as the Council and the Permanent Mandates Commission, equally disappeared for good. If the pledges were to serve any purpose at all as to ensure the observance of the Mandates by the Mandatory Powers, they must have been, and were in fact, intended to be addressed more effectively to the individual membes States, thereby confirming once more the possession by the latter of a substantive right or legal interest in the mandate performance in all cases".[52]

Comments

The Court, in its 1966 Judgment, as well as Judge Morelli and Judge van Wyk in their separate opinions, expressed the view that whatever legal right or interest, if any the League Members had, the same was held by them "only during the lifetime of the League, and that when the latter was dissolved", the same got extinguished. The Court found "no principle of law which would warrant" the conclusion that the rights of the League Members continued after dissolution of the League. According to Justice Hidayatullah of the Supreme Court of India, one of the principles adumbrated was that "rights conferred on or vested in persons or entities in a specified capacity or as members of a specified class

52 *Ibid.*, at p. 244.

are not conferred on or vested in them in their personal or individual capacity and therefore ceases to be available to them in a different capacity or as members of another class". It made way for the easy acceptance of the plea of South Africa that after the dissolution of the League the liability to the former Members of the League came to an end."[53]

Judge Morelli regarded "the non-existence of obligations owed by the Mandatory, possibly because of the lapse of the Mandate", as one of the grounds for rejecting the Applicant's claims. In this regard it may be pointed out that in Chapter 4 of this Study we reached the conclusion that the Mandate did not lapse on dissolution of the League. Judge van Wyk expressed the view that the Applicants could not claim under Article 7, "unless the words "Members" of the League of Nations" in the Mandate are given a meaning which includes ex-members of the League who were members at the time of its dissolution."

On the other hand, Judge Read in his separate opinion to the 1950 Advisory Opinion, and the Court in its 1962 Judgment expressed the view that if the Mandatory's right to administer the territory continues after the dissolution of the League, the rights of the States who were members of the League also continue. According to Judge Read. "the same reasons which justify the conclusion that the Mandate and the obligations of the Union were not brought to an end by dissolution of the League, lead inevitably to the conclusion that the legal rights and interests of the Members, under the Mandate, survived." Further, the Court, in its 1950 Advisory Opinion, regarded Article 7 to be still in force in view of Article 37 of the Statute of the International Court of Justice and Article 80 (1) of the Charter.

Judge Spiropolous, in his dissenting opinion to the 1962 Judgment, "found that...it was difficult to find that the

53 In his book on *The South West Africa Case* at p. 68.

Mandate was a treaty or convention within the meaning of Artlcle 37 of the Statute of the Court." On the other hand, the Court in its 1962 Judgment pointed out that the right to invoke the judicial control of the Mandate "was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision." However, Judge van Wyk found "no evidence to justify an inference that the authors of the Mandates System intended that a State which has ceased to be a member of the League should retain rights conferred on it as a member of the League." According to him, termination of a right resulted in the lapse of obligation. However, if this view is accepted, we would have to say that the right of the Respondent to continue administering the territory also came to an end.

Both Judge McNair in his separate opinion, and the Court in its 1962 Judgment, emphasized that the States, which were members of the League at the time of its dissolution, still continue to possess their rights under the Mandate and their interest in the proper exercise thereof. Judge Wellington Koo, in his dissenting opinion to the 1966 Judgment referred to the League resolution and the pledges given by the Mandatories at the last session of the League. (See Annexures V and VI to this study.) According to him these pledges were given to the Members of the League, and not to the League Assembly which was going to be dissolved. "If the pledges were to serve any purpose at all as to ensure the observance of the Mandates by the Mandatory Powers, they must have been, and were in fact, intended to be addressed more effectively to the individual member States thereby confirming once more the possession by the latter of a substantive right or legal interest in the mandate performance in all cases"

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54 *South West Afria (second phase) Judgment, 1966*, at p. 29.

4. Conclusions

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

(i) The distinction made by the Court, in its 1966 Judgment, in regard to the provisions of the Mandate, for the interpretation and application of which the individual League members could refer the dispute under Article 7 to the Court, is artificial and is without any legal foundation ;

(ii) Every individual League Member had a legal right and interest under Article 7 of obtaining, from the Court, a decision on its dispute with the Mandatory concerning interpretation and application of any or all provisions of the Mandate ; and

(iii) Every State which was a member of the League at the time of its dissolution still continues to possess the aforesaid legal right and interest.

CHAPTER VI

VIOLATION BY THE RESPONDENT OF ITS LEGAL OBLIGATIONS

1. *Submissions of parties on the issue.*
2. *Mandatory's obligation to promote well-being and social progress of inhabitants under Article 2(2) of the Mandate.*
3. *Extent and scope of Mandatory's discretionary powers in regard to administration of the mandated territory.*
4. *Legal norm and standards of non-discrimination.*
5. *Respondent's policy of* apartheid.
6. *Modification by the Respondent of the terms of the Mandate.*
7. *Measures taken by the Respondent to incorporate the territory into South Africa.*
8. *Military training of natives and establishment of military bases on the territory.*
9. *Refusal by the Respondent to submit annual reports and to transmit petitions to the United Nations.*
10. *Conclusions.*

1. Submissions of parties on the issue

1966 Judgment

Separate opinion

JUDGE VAN WYK

"If one now compares the final submissions with the original statement of the precise nature of Applicants'

claims in the Applications, it appears that the claims based upon allegations of arbitrary, unreasonable, and unjust actions, and on conduct detrimental to human dignity, have disappeared from the final submissions. The same applies to claims based on allegations that Respondent had in fact failed to achieve the results contemplated by Article 2(2) of the Mandate. Indeed it appears quite clearly that the allegation of failure on the part of the Respondent to perform its duties has been narrowed down to breaches of an alleged international norm and or standards as defined at page 273 of the Reply....."[1]

".....in a case like the present (assuming jurisdiction and admissibility), the Applicants are entitled to place any dispute falling within a defined category before the Court. To ascertain the nature of the dispute, reference must *prima facie* be had to the submissions. The Court may, in my view, depart from the submissions only where it is satisfied that they do not accurately reflect the intention of the Applicants, and where, in addition, the Court is satisfied that the Respondent had adequate knowledge or notice of the actual case sought to be made by the Applicants. It goes without saying that no Court would decide an issue against a party who has not had proper and fair notice thereof."[2]

And

"The effect of the submissions, read together with Applicants' formal definitions and explanations, is consequently that the norm and standard upon which the Applicants rely are contended to be absolute rules of law in terms of which measures which distinguish in the manner described are *per se* invalid, no matter what the facts and

1 *South West Africa (second phase) Judgment, 1966*, at p. 147.

2 *Ibid.*, at p. 149.

circumstances may be. Such policies of differentiation (i.e. discrimination or separation as defined) are in Applicants' Agent's own words "impermissible.....at all times, under all circumstances, and in all places". The alleged norm and standards apply, according to Applicants' Agent, irrespective of whether or not the policies in question in fact promote the progress and well-being of the population as a whole. For this reason he contended that no evidence relative to purpose, motive, effect, etc., would be relevant or admissible.

"Respondent has never disputed that its policies do in important respects allot rights, duties, etc., on the basis of membership in the various ethnic groups in the Territory, and has indeed contended that the circumstances in the Territory are such as to render such policies desirable, if not inevitable. Nothing need now be said about the merits of Respondents' policies. For present purposes it is important to note only that if the norm or standard as defined at page 274 of the Reply did exist and were applicable to South West Africa, at least a substantial number of Respondents' measures or policies would be in conflict therewith. The effect of this is that the issue before the Court, which is presented as being whether Respondents' policies violated Article 2(2) of the Mandate, in reality turns only on whether Respondent is bound to conform to the alleged norm or standards in the administration of the Territory".[3]

Dissenting opinions

JUDGE TANAKA

"Now the Applicants do not allege the violation of obligations by the Respondent indepently of any

3 *Ibid.*, at p. 154.

legal norm or standards. Since the Applicants' amended Submission No. 4 in the Memorials had inserted a phrase "in the light of applicable international standards or international legal norm", the violation of the obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant (Submission No. 3) which is identical with the failure to promote to the utmost—the material and moral well-being and social progress of the inhabitants of the Territory (Submission No. 4) has come to possess a special meaning, namely of a juridical character. Applicants' cause is no longer based directly on a violation of the well-being and progress by the practice of *aparthied*, but on the alleged violation of certain international standards or international legal norm and not directly on the obligation to promote the well-being and social progress of the inhabitants. There is no doubt that, if such standards and norm exist, their observance in itself may constitute a part of Respondents' general obligations to promote the well-being and social progress".[4]

And

Briefly, the Applicants' Submissions Nos. 3 and 4, as newly formulated rest upon a norm and or standard. This norm or standard has been added by the Applicants to Submission No. 4. The existence of this norm or standard to be applied to the Mandate relationships, according to the Applicants' allegations, constitutes a legal limitation of the Raspondent's discretionary power and makes the practice of *aparthied* illegal, and accordingly a violation of the obligations incumbent on the Mandatory."[5]

"The Respondent denies the existence of a norm or standard to prohibit the practice of *aparthied* and tries to

4 *Ibid.*, at pp. 285 at 286.
5 *Ibid.*, at p. 286.