*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

## 1966

Part Three. Judicial decisions on questions relating the United Nations and related inter-governmental organizations

Chapter VII. Decisions of international tribunals

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## Chapter VII

# DECISIONS OF INTERNATIONAL TRIBUNALS

## International Court of Justice

SOUTH WEST AFRICA CASES (ETHIOPIA v. SOUTH AFRICA; LIBERIA v. SOUTH AFRICA); SECOND PHASE; JUDGEMENT OF 18 JULY 1966[1]

On 18 July 1966, the International Court of Justice delivered its Judgement in the second phase of the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa).

These cases, relating to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory thereunder, were instituted by Applications of the Governments of Ethiopia and Liberia filed in the Registry on 4 November 1960. By an Order of 20 May 1961 the Court joined the proceedings in the two cases. The Government of South Africa raised preliminary objections to the Court's proceeding to hear the merits of the case, but these were dismissed by the Court on 21 December 1962, the Court finding that it had jurisdiction to adjudicate upon the merits of the dispute.

In its Judgement in the second phase the Court recalled that the Applicants, acting in the capacity of States which had been Members of the former League of Nations, had put forward various allegations of contraventions of the League of Nations Mandate for South West Africa by the Republic of South Africa.

The contentions of the Parties had covered, *inter alia*, the following issues: whether the Mandate for South West Africa was still in force and, if so, whether the Mandatory's obligation to furnish annual reports on its administration to the Council of the League of Nations had become transformed into an obligation so to report to the General Assembly of the United Nations; whether the Respondent had, in accordance with the Mandate, promoted to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory; whether the Mandatory had contravened the prohibition in the Mandate of the "military training of the natives" and the establishment of military or naval bases or the erection of fortifications in the Territory; and whether South Africa had contravened the provision in the Mandate that it (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 United Nations General Assembly, which, it was contended by the Applicants, had replaced the Council of the League for this and other purposes.

Before dealing with these questions, however, the Court considered that there were two questions of an antecedent character, appertaining to the merits of the case, which might render an enquiry into other aspects of the case unnecessary. One was whether the Mandate still subsisted at all and the other was the question of the Applicants' standing in this phase of the proceedings—i.e., their legal right or interest regarding the subject-matter of their claims. As the Court based its Judgement on a finding that the Applicants did not possess

[1] *I.C.J. Reports 1966*, p. 6.

such a legal right or interest, it did not pronounce upon the question of whether the Mandate was still in force. Moreover, the Court emphasized that its 1962 decision on the question of competence had been given without prejudice to the question of the survival of the Mandate—a question appertaining to the merits of the case, and not in issue in 1962 except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue—which was all that was then before the Court.

Turning to the basis of its decision in the present proceedings, the Court recalled that the Mandates System had been instituted by Article 22 of the Covenant of the League of Nations. There were three categories of mandates, "A", "B" and "C" mandates, which had, however, various features in common as regards their structure. The principal element of each instrument of mandate consisted of the articles defining the mandatory's powers and its obligations in respect of the inhabitants of the territory and towards the League and its organs. The Court referred to these as the "conduct" provisions. In addition, each instrument of mandate contained articles conferring certain rights relative to the mandated territory directly upon the Members of the League as individual States, or in favour of their nationals. The Court referred to rights of this kind as "special interests", embodied in the "special interests" provisions of the mandates.

In addition, every mandate contained a jurisdictional clause, which, with a single exception, was in identical terms, providing for a reference of disputes to the Permanent Court of International Justice, which, the Court had found in the first phase of the proceedings, was now, by virtue of Article 37 of the Court's Statute, to be construed as a reference to the present Court.

The Court drew a distinction between the "conduct" and the "special interests" provisions of the mandates. The present dispute relating exclusively to the former, the question to be decided was whether any legal right or interest was vested in Members of the League of Nations individually as regards the "conduct" clauses of the mandates—i.e., whether the various mandatories had any direct obligation towards the other Members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates. If the answer were that the Applicants could not be regarded as possessing the legal right or interest claimed, then even if the various allegations of contraventions of the Mandate for South West Africa were established, the Applicants would still not be entitled to the pronouncements and declaration which, in their final submissions, they asked the Court to make.

It was in their capacity as former Members of the League of Nations that the Applicants appeared before the Court; and the rights they claimed were those that the Members of the League were said to have been invested with in the time of the League. Accordingly, in order to determine the rights and obligations of the parties relative to the Mandate, the Court had to place itself at the point in time when the Mandates System was instituted. Any enquiry into the rights and obligations of the parties must proceed principally on the basis of considering the texts of the instruments and provisions in the setting of their period.

Similarly, attention must be paid to the juridical character and structure of the institution, the League of Nations, within the framework of which the Mandates System was organized. A fundamental element was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat". Individual member States could not themselves act differently relative to League matters unless it was otherwise specially so provided by some article of the Covenant.

It was specified in Article 22 of the Covenant that the "best method of giving practical effect to [the] principle" that the "well-being and development" of those peoples in former enemy colonies "not yet able to stand by themselves" formed "a sacred trust of civilization", was that "the tutelage of such peoples should be entrusted to advanced nations . . . who are

willing to accept it" and it specifically added that it was "on behalf of the League" that "this tutelage should be exercised by [those nations] as Mandatories". The mandatories were to be the agents of the League and not of each and every Member of it individually.

Article 22 of the Covenant provided that "securities for the performance" of the sacred trust were to be "embodied in this Covenant". By paragraphs 7 and 9 of Article 22, every mandatory was to "render to the Council an annual report in reference to the territory"; and a Permanent Mandates Commission was to be constituted "to receive and examine" these annual reports and "to advise the Council on all matters relating to the observance of the mandates". In addition, it was provided, in the instruments of mandate themselves, that the annual reports were to be rendered "to the satisfaction of the Council".

Individual States Members of the League could take part in the administrative process only through their participation in the activities of the organs by means of which the League was entitled to function. They had no right of direct intervention relative to the mandatories: this was the prerogative of the League organs.

The manner in which the mandate instruments were drafted only lent emphasis to the view that the Members of the League generally were not considered as having any direct concern with the setting up of the various mandates. Furthermore, while the consent of the Council of the League was required for any modification of the terms of the mandate, it was not stated that the consent of individual Members of the League was additionally required. Individual Members of the League were not parties to the various instruments of mandate, though they did, to a limited extent, and in certain respects only, derive rights from them. They could draw from the instruments only such rights as these unequivocally conferred.

Had individual Members of the League possessed the rights which the Applicants claimed them to have had, the position of a mandatory caught between the different expressions of view of some forty or fifty States would have been untenable. Furthermore, the normal League voting rule was unanimity, and as the mandatory was a member of the Council on questions affecting its mandate, such questions could not be decided against the mandatory's contrary vote. This system was inconsistent with the position claimed for individual League Members by the Applicants, and if, as Members of the League, they did not possess the rights contended for, they did not possess them now.

It had been attempted to derive a legal right or interest in the conduct of the Mandate from the simple existence, or principle, of the "sacred trust". The sacred trust, it was said, was a "sacred trust of civilization" and hence all civilized nations had an interest in seeing that it was carried out. But in order that this interest might take on a specifically legal character the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. The moral ideal must not be confused with the legal rules intended to give it effect. The principle of the "sacred trust" had no residual juridical content which could, so far as any particular mandate was concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole.

Nor could the Court accept the suggestion that even if the legal position of the Applicants and of other individual Members of the League were as the Court held it to be, this was so only during the lifetime of the League, and that on the latter's dissolution the rights previously resident in the League itself, or in its competent organs, devolved upon the individual States which were Members of it at the date of its dissolution. Although the Court had held in 1962 that the members of a dissolved international organization could be deemed, though no longer members of it, to retain rights which, as members, they had individually possessed when the organization was in being, this could not extend to ascribing to them, upon and by reason of the dissolution, rights which, even previously as members, they never

had individually possessed. Nor could anything that occurred subsequent to the dissolution of the League operate to invest its Members with rights they did not previously have as Members of the League. The Court could not read the unilateral declarations, or statements of intention, made by the various mandatories on the occasion of the dissolution of the League, expressing their willingness to continue to be guided by the mandates in their administration of the territories concerned, as conferring on the Members of the League individually any new legal rights or interests of a kind they did not previously possess.

It might be said that in so far as the Court's view led to the conclusion that there was now no entity entitled to claim the due performance of the Mandate, it must be unacceptable, but if a correct legal reading of a given situation showed certain alleged rights to be non-existent, the consequences of this must be accepted. To postulate the existence of such rights in order to avert those consequences would be to engage in an essentially legislative task, in the service of political ends.

Turning to the contention that the Applicants' legal right or interest had been settled by the 1962 Judgement and could not now be reopened, the Court pointed out that a decision on a preliminary objection could never be preclusive of a matter appertaining to the merits, whether or not it had in fact been dealt with in connexion with the preliminary objection. When preliminary objections were entered by the defendant party in a case, the proceedings on the merits were suspended, by virtue of Article 62, paragraph 3, of the Court's Rules. Thereafter, and until the proceedings on the merits were resumed, there could be no decision finally determining or prejudging any issue of merits. A judgement on a preliminary objection might touch on a point of merits, but this it could do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. It could not rank as a final decision on the point of merits involved.

While the 1962 Judgement decided that the Applicants were entitled to invoke the jurisdictional clause of the Mandate, it remained for them, on the merits, to establish that they had such a right or interest in the carrying out of the provisions which they invoked as to entitle them to the pronouncements and declarations they were seeking from the Court. There was no contradiction between a decision that the Applicants had the capacity to invoke the jurisdictional clause and a decision that the Applicants had not established the legal basis of their claim on the merits.

In respect of the contention that the jurisdictional clause of the Mandate conferred a substantive right to claim from the Mandatory the carrying out of the "conduct of the Mandate" provisions, it was to be observed that it would be remarkable if so important a right had been created in so casual and almost incidental a fashion. There was nothing about this particular jurisdictional clause, in fact, to differentiate it from many others, and it was an almost elementary principle of procedural law that a distinction had to be made between, on the one hand, the right to activate a court and the right of a court to examine the merits of a claim, and, on the other, the plaintiff's legal right in respect of the subject-matter of its claim, which it would have to establish to the satisfaction of the court. Jurisdictional clauses were adjectival, not substantive, in their nature and effect: they did not determine whether parties had substantive rights, but only whether, if they had them, they could vindicate them by resources to a tribunal.

The Court then considered the rights of members of the League Council under the jurisdictional clauses of the minorities treaties signed after the First World War, and distinguished these clauses from the jurisdictional clauses of the instruments of mandate. In the case of the mandates, the jurisdictional clause was intended to give the individual Members of the League the means of protecting their "special interests" relative to the mandated territories; in the case of the minorities treaties, the right of action of the members of the Council under the jurisdictional clause was only intended for the protection of minority

populations. Furthermore, any "difference of opinion" was characterized in advance in the minorities treaties as being justiciable, because it was to be "held to be a dispute of an international character". Hence no question of any lack of legal right or interest could arise. The jurisdictional clause of the mandates, on the other hand, had none of the special characteristics or effects of those of the minorities treaties.

The Court next dealt with what had been called the broad and unambiguous language of the jurisdictional clause—the literal meaning of its reference to "any dispute whatever", coupled with the words "between the Mandatory and another Member of the League of Nations" and the phrase "relating . . . to the provisions of the Mandate", which, it was said, permitted a reference to the Court of a dispute about any provision of the Mandate. The Court was not of the opinion that the word "whatever" in Article 7, paragraph 2, of the Mandate did anything more than lend emphasis to a phrase that would have meant exactly the same without it. The phrase "any dispute" (whatever) did not mean anything intrinsically different from "a dispute"; nor did the reference to "the provisions" of the Mandate, in the plural, have any different effect from what would have resulted from saying "a provision". A considerable proportion of the acceptances of the Court's compulsory jurisdiction under paragraph 2 of Article 36 of its Statute were couched in language similarly broad and unambiguous and even wider. It could never be supposed that on the basis of this wide language the accepting State was absolved from establishing a legal right or interest in the subject-matter of its claim. The Court could not entertain the proposition that a jurisdictional clause by conferring competence on the Court thereby and of itself conferred a substantive right.

The Court next adverted to the question of admissibility. It observed that the 1962 Judgement had simply found that it had "jurisdiction to adjudicate upon the merits" and that if any question of admissibility were involved it would fall to be decided now, as had occurred in the merits phase of the *Nottebohm* case; if this were so the Court would determine the question in exactly the same way. In other words, looking at the matter from the point of view of the capacity of the Applicants to advance their present claim, the Court would hold that they had not got such capacity, and hence that the claim was inadmissible.

Finally, the Court dealt with what had been called the argument of "necessity". The gist of this was that since the Council of the League had no means of imposing its views on the Mandatory, and since no advisory opinion it might obtain from the Court would be binding on the latter, the Mandate could have been flouted at will. Hence, it was contended, it was essential, as an ultimate safeguard or security for the sacred trust, that each Member of the League should be deemed to have a legal right or interest in that matter and be able to take direct action relative to it. But in the functioning of the Mandates System in practice, much trouble had been taken to arrive, by argument, discussion, negotiation and co-operative effort, at generally acceptable conclusions and to avoid situations in which the mandatory would be forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. In this context, the existence of substantive rights for individual Members of the League in the conduct of the mandates exercisable independently of the Council would have been out of place. Furthermore, leaving aside the improbability that, had the framers of the Mandates System intended that it should be possible to impose a given policy on a mandatory, they would have left this to the haphazard and uncertain action of individual Members of the League, it was scarcely likely that a system which deliberately made it possible for mandatories to block Council decisions by using their veto (though, so far as the Court was aware, this had never been done) should simultaneously invest individual Members of the League with a legal right of complaint if the mandatory made use of this veto. In the international field, the existence of obligations that could not be enforced by any legal process had always been the rule rather than the exception—and this had been even more the case in 1920 than today.

Moreover, the argument of "necessity" amounted 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 such a right was not known to international law as it stood at present: and the Court was unable to regard it as imported by "the general principles of law" referred to in Article 38, paragraph 1 C, of its Statute.

In the final analysis, the whole "necessity" argument appeared to be based on considerations of an extra-legal character, the product of a process of after-knowledge. It was events subsequent to the period of the League, not anything inherent in the Mandates System as it had been originally conceived, that gave rise to the alleged "necessity", which, if it existed, lay in the political field and did not constitute necessity in the eyes of the law. The Court was not a legislative body. Parties to a dispute could always ask the Court to give a decision *ex aequo et bono*, in terms of paragraph 2 of Article 38. Failing that, the duty of the Court was plain; its duty was to apply the law as it found it, not to make it.

It might be urged that the Court was entitled to "fill in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. This principle was a highly controversial one and it could, in any event, have no application to circumstances in which the Court would have to go beyond what could reasonably be regarded as being a process of interpretation and would have to engage in a process of rectification or revision. Rights could not be presumed to exist merely because it might seem desirable that they should. The Court could not remedy a deficiency if, in order to do so, it had to exceed the bounds of normal judicial action.

It might also be urged that the Court would be entitled to make good an omission resulting from the failure of those concerned to foresee what might happen and to have regard to what it might be presumed the framers of the Mandate would have wished, or would even have made express provision for, had they had advance knowledge of what was to occur. The Court could not however presume what the wishes and intentions of those concerned would have been in anticipation of events that had been neither foreseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumption contended for by the Applicants as to what those intentions were.

In the light of these various considerations, the Court found that the Applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of their claims. Accordingly, by the President's casting vote—the votes being equally divided (seven to seven)—the Court decided to reject the claims.

The Judgement was delivered by the Court composed as follows: President Sir Percy Spender; Vice-President Wellington Koo; Judges Winiarski, Spiropoulos, Sir Gerald Fitzmaurice, Koretsky, Tanaka, Jessup, Morelli, Padilla Nervo, Forster, Gros; Judges *ad hoc* Sir Louis Mbanefo, van Wyk.

Sir Percy Spender appended a declaration to the Judgement and Judges Morelli and van Wyk appended separate opinions. Judges Wellington Koo, Koretsky, Tanaka, Jessup, Padilla Nervo, Forster and Sir Louis Mbanefo appended dissenting opinions.

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