The South West Africa Cases (1966): Two Views

I

"Legal right or interest" in the South West Africa Cases: a Critical Comment

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To the reasonable man uninitiated in the mysteries of the international judicial process, the recent decision of the International Court of Justice in the South West Africa Cases, Second Phase, must have seemed surprising. On the casting vote of its Australian President, the Court held that Ethiopia and Liberia had no legal right or interest in the subject-matter of their claim against South Africa, four years after a decision by the same Court that the applicants were entitled to invoke its jurisdiction. In his dissent, Judge Jessup recorded his view that the Court's judgment was "completely unfounded in law" and that the Court was not legally justified in stopping at the threshold of the case, avoiding a decision on the "fundamental question" whether the policy and practice of apartheid in South West Africa was compatible with the discharge of the "sacred trust" confided to the Republic of South Africa as Mandatory. No one would dispute the Court's contention that rights cannot be presumed to exist merely because it might seem desirable that they should, but neither should the clear words and purpose of the Mandate agreement be denied on the grounds that it "would be remarkable" if the rights contended for had been created incidentally.

Many aspects of the decision deserve examination (e.g., questions of the survival of the Mandate, the binding effect of the 1962 judgment, the doctrine of non ultra petita, etc.) but space permits only a brief and incomplete consideration of the central core of the decision, the requirement of a "legal right or interest".

The novice might be excused for believing that this point had been decided in 1962. The Court then held, inter alia, in discussing the respondent's third preliminary objection to the jurisdiction: "The manifest scope and purport of the provisions of this article (article 7

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1 The two articles appearing under this title reflect contrasting standpoints towards the controversial South West Africa Cases, Second Phase, I.C.J. Reports 1966, p. 6, decided by the International Court of Justice in 1966.
3 1966, I.C.J. Reports, p. 323.
5 1966 I.C.J. Reports, p. 38.
of the Mandate Agreement) 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 toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."[6] The 1966 judgment considered that the preliminary objections were merely objections to the jurisdiction of the Court, although in the 1962 judgment (and the dissenting opinion of Judge Morelli) it was emphasized that they included objections to the admissibility of the claim. The distinction is well established in the jurisprudence of the Court.[7] It is clear from the pleadings that the parties considered that the matter had already been disposed of. The question was not even raised by South Africa in its final submissions. The legal interest of the applicants was regarded as an issue relevant in the context of the scope of the compromissory clause and, as such, an issue of admissibility, a point decided in 1962. Nevertheless, the recent judgment concluded that the Court’s disposal of the 1962 submissions was merely provisional though nothing of the sort was then suggested. The court stated that there was one matter which appertained to the 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”.[8]

The South West Africa Mandate Agreement established a regime of tutelage for the well-being and development of the peoples of an undeveloped territory. This was to be exercised by an “advanced nation”, South Africa, as a “sacred trust of humanity”. The Mandate contained several articles defining the obligations which the Mandatory power owed to the League of Nations and those which it owed to the inhabitants of the territory. It also included an article 5, which contained provisions for the protection of missionaries and established freedom of worship. In addition, article 7, provided for administration and legal supervision of the Mandatory power. Article 7(2) provided:—

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provision of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."[9]

It was decided in 1962 that there was “a dispute” and that it could not be settled by negotiation. In the 1966 judgment, a clear distinction is made between the “conduct” and the “special interest” provisions of

8 1966 I.C.J. Reports, p. 18.
the Mandate and it was stated that only in respect of article 5 (the missionary clause) could the members have recourse to article 7 (2). Nowhere in article 7 (2) is there any express provision that it is so limited. On the contrary, the clause provided for the adjudication of "any dispute whatever ... relating to the interpretation or application of the Mandate Agreement". Nor does the fact that articles 5 and 7 were introduced at the same time prove anything, despite the majority's contention that it does.

The rationale of the judgment is based on the old maxim pas d'interêt, pas d'action. Admittedly, it is generally true that a State should have some sort of legal interest in the subject-matter of its claim. The point at issue is the precise legal nature of this right or interest. It is not denied in the judgment that a State may be entitled to uphold a general principle even though its alleged contravention has not affected the material interests of the State concerned, but such a right or interest must be clearly vested by some treaty or instrument. From its analysis of the Mandate, the Court held that no such general interest was vested in the League members by the text. Consequently, the only rights or interests the Court could protect were those pertaining to its own economic interests or for the protection of its missionaries. The opposing view was succinctly stated by judge ad hoc Mbanefo in his separate opinion in 1962. After finding no substance in the requirement of a material interest he was of the view that, "even if any such interest is required to sustain an action under article 7, absence of such interest may be a ground for refusing a claim but not for denying jurisdiction and, in any event, the Applicants ... have such interest in ensuring that the Mandatory carry out its international obligations under the Mandate." According to this view, the only occasion on which a material interest must be demonstrated is when reparation is being claimed for some sort of injury. No such claim was made by Liberia and Ethiopia.

This brings us to the crucial point. What is the situation where a State does not claim anything for itself but merely requests a declaration of law in order to settle a dispute? Neither the statute nor the rules positively require the applicant to show that it has brought proceedings in order to protect a "legal interest" (as characterized in the present judgment.) Rather, it is probably true to say that the objective of the settlement of international disputes is more prominent in the theory of international litigation than the mere protection of legal rights and interests. All that is necessary is that a State must be able to show some direct concern in the outcome of the case. According to Rosenne, a form of legal interest which is automatically recognized is that which is based on the participation by the

10 1966 I.C.J. Reports, p. 32.
13 S. Rosenne, op. cit., p. 520.
applicant State in a treaty to which the respondent State is also a party.

In the Reservations Case the Court said of the Genocide Convention: "In such a Convention the contracting States do not have any interests of their own; they merely have... a common interest, namely the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[14] In The Wimbledon[15] it was stated that the court could take cognizance of the suit in spite of the fact that the applicants could not show prejudice by way of a pecuniary interest, since, as they all possessed fleets and merchant vessels, they had a clear interest in the execution of the provisions of the Treaty of Versailles relating to the Kiel Canal.

This is an eminently sensible approach. Presumably, States become parties to a treaty because they have an interest in the achievements of its objects. This interest must be a legal interest or there would be no point in clothing it in legal form. If, as usually occurs in a treaty, the parties provide that disputes concerning the interpretation or application of the treaty should be submitted to an international tribunal, then it should not be necessary to establish any further interest—it is manifested by the very fact of participation in the treaty. (If this principle were not accepted it might conceivably be possible to argue that for example, a party to the European Convention of Human Rights of 1950 could not espouse the cause of a foreign national before the European Court of Human Rights under articles 24, 45 and 48 of the convention on the grounds that it did not possess the requisite right and interest.)

Of course, in the South West Africa Cases, the applicants were not strictly speaking parties to the Mandate agreement but were exercising rights under stipulations per autrui (though this is doubted by some of the minority judges). The Mandates were concluded by the League Council on behalf of its members and the Mandatories. As Judges Jessup, Tanaka, and Mbanefo show in their dissenting opinions, there are clear analogies in municipal law, where members of certain organizations have enforceable legal interests apart from those exercised by the organizations themselves. Moreover in the present circumstances, only States could be parties in contentious proceedings before the Court, the only method of obtaining a binding decision concerning the interpretation and application of the Mandate.

A compromissory clause such as that in article 7 (2) of the Mandate gives locus standi before a tribunal; unless it also gives the right to obtain a declaration of the law on the substantive issues it is worse

14 Reservations to the Genocide Convention Case, 1951 I.C.J. Reports, 15, at p. 23.
than useless. Judge Jessup approves Jaffe's proposition that "the very recognition of the plaintiff's right to sue is the law's best testimony to the existence of a substance right". Nor should an applicant need to establish damage to its material interests, if all it is seeking is a declaration of the law regarding the interpretation or application of a treaty under which it possesses the right to seize the Court of a dispute. It would naturally be different if reparation was claimed. There is ample authority for the power of the Court to give declaratory judgments. In the Northern Cameroons Case, Sir Gerald Fitzmaurice in his separate opinion said, that by not claiming any compensation, the applicant State placed itself in a position in which, had the Court proceeded to the merits, the applicant could have obtained a judgment in its favour merely by establishing that breaches of the trusteeship agreement had been committed, without having to establish (as it would have to have done if reparation had been claimed) the international responsibility of the United Kingdom. There could however still be a continuing legal situation in which a pronouncement that illegalities had occurred would be legally material and relevant. Similarly in the case concerning the German Interests in Upper Silesia the Permanent Court of International Justice found no reason why States should not be able to request an abstract interpretation of a treaty. Rather this was one of the important functions which it could fulfill.

With Shibata, one is "inclined to conclude that the International Court has exercised its jurisdiction to give declaratory judgments only when the abstract questions submitted had some relevance to a standing dispute between the parties." This, however, was the exact situation in the present case.

Shihata gives an excellent summary of what the law was thought to be before the recent judgment. First, the existence of a dispute is required for the admissibility of a claim. This dispute, understood in a broad sense, should go to the legal interests of the applicant, at least in the sense that the latter should expect some benefit protected by law from a favourable decision on the merits. However, such interest need not be material, and will be assumed to exist where the jurisdictional instruments clearly enable the applicant to bring the case before the Court even in the absence of any apparent and direct interest (for example, as in the case of the protection of minorities who are not nationals of the applicant States).

A curious aspect of the case was the general assertion that it is inconceivable that the statesmen of 1919 would have had in mind the
possibility of recognizing that States might have a general interest, cognizable in the international court, in the maintenance of an international régime for the common benefit of the international society. On the contrary, there is a great deal of evidence that there was a recognition of the rights of States, in the general interest (i.e., without the need to assert direct injury suffered by them or their nationals) to resort to the Court for an authoritative interpretation of the meaning of obligations which States had assumed for the protection of workers, minorities, and dependent peoples.\(^{22}\) Under the Minorities System (established contemporaneously with the Mandates System) members of the League Council had the right to invoke the jurisdiction of the Court to decide disputes concerning matters of law or fact. Similarly, the practice of the International Labour Organisation evidences general agreement on the common interest of all states in humane conditions of labour throughout the world. The case concerning the Interpretation of the Statute of Memel Territory, which was decided at the same time as the Paris Peace Treaties were drafted, recognized that States could invoke the general interest even though their immediate interests were not involved.\(^{23}\) In addition, it is well established that States have a general legal concern in the observance of the general rules of international law\(^ {24}\) as well as the right to concern themselves on humanitarian grounds with atrocities affecting foreign nationals.\(^ {25}\) Thus there was nothing novel or surprising about the Mandate provisions. It is open to question whether any significance can be drawn from the fact that while all League members were given rights under the compromissory clause in the Mandates system, only Council members possessed the right to seize the Permanent Court under the Minorities system. Quincy Wright's view was that League members had rights in the mandated territory not only for the protection of their national interests and the interests of their nationals, but also for the protection of the interests of the inhabitants of the area. "Every member of the League can regard its rights as infringed by every violation by the mandatory of its duties under the mandate, even those primarily for the benefit of the natives, and can make representations which if not effective will precipitate a dispute referable to the Permanent Court of International Justice if negotiation fails to settle it",\(^ {26}\) (this view is obviously more attuned to the objects of the authors of the mandates than the judgment of the Court).

Judge Read in his 1950 dissenting opinion said: "Each member of the League had a legal interest, \(\text{vis-à-vis}\) the Mandatory Power, in matters relating to the interpretation or the application of the pro-

\(^{22}\) Shibata, op. cit., p. 214.

\(^{23}\) Interpretation of the Statute of Memel Territory Case, 1932, P.C.I.J., Ser. A/B, No. 49.

\(^{24}\) This is implicit perhaps in the provisions of the United Nations Charter.


\(^{26}\) Q. Wright, Mandates under the League of Nations, Chicago 1930, p. 475.
visions of the Mandate'; and had a legal right to assert its interest against the Union by invoking the compulsory jurisdiction of the Permanent Court (article 7 of the Mandate Agreement)."[27]

One can only agree. There is no evidence that the authors of the Mandates system were thinking of the missionary and commercial interests of their nationals only, and not the main purpose of the Mandate, when article 7 (2) was formulated. More evidence of this is provided by the drafting history of the so-called "Tanganyika clause". This was an additional paragraph originally included in the jurisdiction clauses of the Mandates, but later dropped from all except the Tanganyika Mandate. It permitted States to apply to the Court for the protection of their own nationals, and appeared immediately after the existing compromissory clause. The simplest explanation of its withdrawal is that it was realized that such rights were included in article 7 (2), i.e., article 7 (2) cannot have been meant solely for the protection of national interests. The attempt of the judgment to minimize the importance of this point is unsatisfactory.[28]

The implications of the Court's decision are far reaching and unacceptable. It means that no binding decision could have been taken by the Court in respect of the interpretation and application of the "conduct clauses" of the Mandate. The respondent would not have been legally bound by any advisory opinion requested by the League. It would have possessed an unreviewable discretion and could in fact have disregarded all the provisions concerning the treatment of the undeveloped people without fear of legal redress. This is a reductio ad absurdum of the manifest intention of the founders of the League. The reason for allowing recourse by a League member to the Court was obvious; it was the final bulwark against abuses or breaches of the Mandate. Without this additional security, the League's supervision of the Mandate could not have been effective in the last resort.

Finally, it may be asked (since the respondent in its Counter-Memorial admits what the Court's judgment does not allow, i.e., that in certain circumstances, such as allegations of slave or liquor trafficking, the League members might have a legal interest in the "conduct clauses" of the Mandate) whether allegations of racial discrimination in contiguous territories might not be of a similar legal interest?

It is unfortunate that the majority of the Court did not take note of the words of a noted Australian stateman and jurist before arriving at their conclusions; in Ffrost v. Stevenson,[29] Evatt, J., remarked in the High Court of Australia, "... In any analysis of the legal and constitutional basis of the government of the Mandated Territory the primary duty of English courts is to attend to the objects and purposes of the Mandates system, to avoid 'a quibbling interpretation' and 'a merely pedantic adherence to particular words,' 'to discover and to give affect to all the beneficent intentions' embodied in the instrument."

28 1966 I.C.J. Reports, p. 44.