# II

# An Examination of Certain Criticisms of the South West Africa Cases Judgment

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Australian lawyers, with experience of practice in the equity jurisdiction or in constitutional law cases, may find it difficult to be convinced by certain of the criticisms levelled against the decision in the *South West Africa Cases, Second Phase*. Moreover, upon a careful perusal of the main judgment, it may well be felt that, on a number of points, the reasoning underlying the decision is not merely cogent, but unassailably correct.

At the outset, there is the crucial matter of *locus standi*—the reef on which the claims of the applicants, Ethiopia and Liberia, foundered. The Court ruled, upon the material before it, 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, and that accordingly it was bound to decline to give effect to these claims.[1] As the Court pointed out, while this was an "antecedent" matter, it was one which went at the same time to the merits of the case.[2] There is a widely current impression, however, that the Court disposed of the applicants' claims by upholding a purely preliminary point, merely on the threshold of the merits.

Equity and constitutional law analogies may spring to the mind at once, in this connexion.

On the equity side, there are the principles for example governing the competence of a private person to sue in his individual capacity in respect of a public nuisance. In order to establish his claim to proceed in his own name and right, he must prove that the alleged nuisance has caused him "some special and peculiar damage beyond what was suffered by the rest of the public",[3] and that such damage is "direct and substantial".[4] These necessary requirements to be fulfilled by a private person bringing a suit for relief against a public nuisance must be established on the hearing of the suit; they are not a preliminary technicality to be disposed of without going into the merits of the

1 1966, I.C.J. Reports, p. 51.

2 1966 I.C.J. Reports, p. 18.

3 *Harper v. G. N. Haden & Sons Ltd.*, [1933] Ch. 298, at p. 315; [1932] All E.R. 59; and *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880, at pp. 907, 918; [1940] 3 All E.R. 349.

4 *Benjamin v. Storr* (1874), L.R. 9 C.P. 400, at p. 407; *Wanderpant v. Mayfair Hotel Co. Ltd.*, [1930] 1 Ch. 138, at p. 153; [1929] All E.R. Rep. 296.

suit, unless in an exceptional case the plaintiff's lack of standing is so clear that the point can be disposed of without entering into evidence.

Similarly, on the constitutional law side, it is not every person who is entitled to bring proceedings challenging the validity of legislation or regulations, as being *ultra vires* the Constitution of the Commonwealth of Australia. A private individual must establish that he has sufficient interest to institute such an action. According to Starke, J., in *Victorian Chamber of Manufacturers v. The Commonwealth*:[5] "Only those whose rights are infringed and not strangers are entitled to challenge the validity of legislation or of regulations or declarations or orders made pursuant to regulations." So a person who is interested merely as a member of the general public, e.g. affected by an increase in the price of a commodity due to allegedly unauthorized governmental action, has not sufficient standing to maintain a suit to declare that the government has acted *ultar vires;* see *Anderson v. The Commonwealth.*[6] In the joint judgment of Gavan Duffy, C.J., and Starke and Evatt, JJ., in the latter case, the following was stated: "Great evils would arise if every member of the Commonwealth could attack the validity of the Acts of the Commonwealth whenever he thought fit."[7] This again could be a point to be disposed of only upon the hearing of the suit unless, as the matter was pleaded, it could be resolved without entering into evidence of the facts and circumstances.

Australian lawyers are therefore unlikely to be moved by the chorus of criticism of the *South West Africa Cases* to the effect that there is something novel in the *locus standi* requirement insisted upon in the main judgment, and that this was a purely preliminary technicality, which could have been disposed of without a full hearing of the applicants' claims.

There is however the further argument that the International Court of Justice erred in so far as it refused to regard itself as bound by its decision in 1962, on the preliminary objection to jurisdiction, when it ruled that the applicants were entitled to invoke the Court's jurisdiction.[8] On this issue of preclusion by the 1962 decision in the earlier stages of the proceedings, the Court made the following points among others: (1) The question in issue in 1962 was that of the applicants' standing before the Court itself, whereas the question of *locus standi* ruled on in 1966 was one of substance, related to the merits of the case.[9] (2) Such a substantive matter, arising on the merits, could not have been the subject of any final determination by a decision on a purely preliminary point of jurisdiction.[10] (3) A decision on a preliminary objection can never be preclusive of a matter appertain-

5 (1943), 67 C.L.R. 335, at p. 343.

6 (1932), 47 C.L.R. 50.

7 (1932), 47 C.L.R., at p. 52.

8 *South West Africa Cases, Preliminary objections* (1962), I.C.J. Reports, p. 319.

9 1966, I.C.J. Reports, p. 18.

10 1966, I.C.J. Reports, p. 18.

ing to the merits, whether or not it has in fact been dealt with in connexion with the preliminary objection. If a judgment on a preliminary objection touches on a point of merits, it can do so only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection, and any finding on the point of merits must therefore rank simply as part of the motivation of the decision on the preliminary objection, without ranking as a final decision on the matter of merits involved.[11] (4) It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between: (a) on the one hand, the right to activate a court and the right of the court to examine the merits of a claim; and (b) on the other hand, a claimant's substantive legal right appertaining to the subject-matter of its suit, which has to be established to the satisfaction of the court concerned.[12]

None of these propositions will appear startling to an Australian lawyer. It is rather a matter for surprise that they have not commended themselves to the critics of the International Court's decision. For instance, a provisional finding by an equity judge, on the hearing of an interlocutory injunction by a private person to restrain a public nuisance, that such person had sufficient interest to institute the proceedings, would not preclude the Court on the hearing of the suit for final decree from holding that the plaintiff was not entitled to bring the suit in his own right. Nor again would any ruling by a Court, on a demurrer denying the plaintiff's *locus standi*, and giving judgment for the plaintiff upon such demurrer, debar the Court on the final hearing of the proceedings from giving judgment for the defendant upon the same point, after all the evidence bearing upon it had been taken. A final illustration is the prerogative writ of mandamus. An applicant for an order of mandamus must establish a legal right in himself to enforce performance of the legal duty to which the application relates; the courts never exercise general powers to enforce the performance of their statutory duties by public bodies "on the application of anybody who chooses to apply for a mandamus".[13] In the State of New South Wales, at least, an order *nisi* granted by a judge calling on a respondent to show cause why a writ of mandamus should not issue, and therefore provisionally admitting the applicant's *locus standi*, would not preclude the Court before which the order *nisi* was returnable from discharging the rule *nisi* upon the ground that the applicant had not demonstrated sufficient legal right to the satisfaction of the Court.[14]

It has been stated that the respondent did not, in the light of the 1962 decision, press the matter of absence of *locus standi* in the applicants. Yet the Court positively affirmed that "the Respondent did in the present phase of the case, particularly in its written pleadings,

11 1966, I.C.J. Reports, p. 37.

12 1966, I.C.J. Reports, p. 39.

13 *R. v. Lewisham Union*, [1897] 1 Q.B. 498, at p. 501, per Bruce, J.

14 For an apt illustration, see *Ex p. Wilkes; Re Minister for Education*, [1961] N.S.W.R. 989, at p. 995.

deny that the Applicants had any legal right or interest in the subject-matter of their claim—a denial which, at this stage of the case, clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate".[15] The crucial point is whether the respondent abandoned this point of denial of *locus standi,* embodied in its written pleadings, and there is apparently nothing to show that it ever did. An allegation or averment, remaining in the written pleadings, and unabandoned, must be dealt with by a Court, unless it is of no substance whatever. In New South Wales, it is common pleading practice in a statement of defence to include an allegation that the plaintiff's claim has been barred by laches, acquiescence, and delay, and whether pressed or not, provided it has not been abandoned, an equity judge would be constrained to deal with the allegation, and it has sometimes been an unpleasant surprise for counsel for a plaintiff to find a suit, otherwise well grounded, dismissed upon such a ground.

Assuming that the Court was entitled to have regard to the question whether or not the applicants possessed substantive *locus standi* on the merits of their claims, few will deny that in the context of the international instruments governing the circumstances of the case, it was open to the Court to find that Member States of the League of Nations had no individual legal interest in themselves, entitling them to take proceedings to ensure that the obligations under the League Mandates system were respected, but that "this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs".[16] The distinction drawn by the Court between "conduct provisions" and "special interests provisions" of the South West Africa Mandate, that is to say between those, on the one hand, defining the Mandatory's powers and its obligations in respect of the inhabitants of the territory and towards the League and its organs, and those, on the other hand, conferring special rights relative to the Mandated Territory directly on the members of the League as individual States or in favour of their nationals,[17] is sound in principle; to those who recall the practical working and operation of the old League Mandates system, with a Permanent Mandates Commission composed of experts in their individual capacity, it is not to be doubted that the principle of organic, collective supervision over a Mandatory Power's performance of "conduct provisions" was one not to be departed from. It was not intended that Member States should have a specific interest to enforce "conduct provisions", notwithstanding that it might be open to them to take action to give effect to any special rights conferred upon them by a Mandate.

The Court's decision does not mean that in the future claimant States approaching the Court will always find themselves frustrated

15 1966, I.C.J. Reports, p. 19.

16 1966, I.C.J. Reports, p. 35.

17 1966, I.C.J. Reports, pp. 20-1.

by an over-technical insistence on *locus standi*. The decision rests on a particular context, that of the South West Africa Mandate, viewed in the light of the special circumstances in which the applicants' claims were made. On the other hand, the doctrine of necessity of *locus standi* is one that ought not to be weakened or watered down, out of anxiety to promote the general welfare of the whole or of specific sectors of mankind. Proceedings before international tribunals related to such matters of human welfare should be instituted and conducted within the framework of established rules of international law, whether of a customary nature or laid down in general law-making Conventions. It may be desirable to further the well-being of the human race by international action, but international tribunals should not be called upon, in the absence of customary rules or rules in law-making Conventions, to operate as legislative innovators for this purpose. In this regard, the maxim *neminem oportet legibus esse sapientiorem* (no one should be wiser than the law) applies to courts as well as to persons.

The clamour for giving more flexibility to the doctrine of *locus standi* before international tribunals, if acceded to, would lead to the paradoxical result that while, at the present time, it is sought on the one hand to promote the principles of peaceful coexistence, one of the most important of which is the duty of States not to interfere in the domestic affairs of other States, international tribunals might be freely utilized, on the other hand, as a medium for interference by plaintiff States in the internal affairs of others on the ground of alleged "legal interest" in matters of human welfare. Would not the enfeeblement by courts of the necessity of *locus standi* be detrimental, in the long run, to the promotion generally of the principles of peaceful coexistence, having regard to the fact that a number of States are prepared to accept the doctrine of peaceful coexistence, primarily because one of its component principles is the duty of non-interference in domestic affairs?

Another point of criticism should be dealt with. It has been urged that, taking into account the length and expense of the litigation in the *South West Africa Cases*, the International Court of Justice should not have confined itself to dismissing the applicants' claims on the ground of absence of *locus standi*, but should, for the benefit of the international community, have expressed its views on the questions of merits raised by the applicants in the proceedings, such as the question whether the practice of *apartheid* was contrary to article 2 of the Mandate and article 22 of the League of Nations Covenant. But this is a criticism which could well be applicable to past judgments of the Court, in which it has abstained from pronouncements on major points, not requiring to be decided. To refrain from *obiter* utterances on important questions is in conformity with sound judicial practice. One may, in this connexion, cite another apt maxim, namely, *cum non necessit decidere, non decidere necessit* (when it is not necessary to decide, it is necessary not to decide). As the President of the Court, Sir Percy Spender, correctly said, for the Court to have

entered into other legal inquiries after rejection of the claims on the ground of absence of *locus standi* would have been "an excess of the judicial function".[18]

A final criticism of the decision has centred on the fact that the President of the Court exercised his casting vote, the Court being equally divided, in favour of the judgment in which he joined. Possibly, it is not a sufficient answer to this criticism to say that, in using his casting vote, the President ought not to be expected to adopt an opinion contrary to that of the judgment in which he joined. For it is conceivable that there may in certain jurisdictions be a judicial convention requiring the presiding judge to exercise a casting vote in a certain direction, even if this be contrary to the tenor of the opinion or judgment in which he has joined; for example, requiring him to use the casting vote in favour of the preservation of the *status quo*. At all events, in support of Sir Percy Spender's exercise of the casting vote in favour of the dismissal of the claims, it can be urged that this action was correct, because otherwise the decision of the Court would have resulted in a startling extension of the doctrine of *locus standi*, with far-reaching consequences. In no way did his exercise of the casting vote involve any departure from the canons of recognized judicial practice.

18 1966, I.C.J. Reports, p. 52.