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THE SOUTH-WEST AFRICA JUDGMENT: A STUDY IN JUSTICIABILITY

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According to Brierly, an international dispute is justiciable if it is "susceptible of decision by the application, in an arbitral or judicial process, of rules of law."[1] It is widely believed that the number of disputes between states to which the judicial process can be applied is extremely limited. The individualistic basis of international jurisdiction and the prevalent political tensions contribute to a limited view of the possibilities of international adjudication. Yet there is a constant need to develop measures of peaceful settlement, and the recent judgment of the International Court of Justice in the *South-West Africa*[2] cases has dramatically demonstrated how important the concept of justiciability is in this search for international justice under law.

I. THE SOUTH-WEST AFRICA LITIGATION

In 1920 the Union of South Africa accepted responsibility for the development of South-West Africa under a mandate from the League of Nations. In the terms of the mandate, South Africa's control of the territory was considered a "sacred trust of civilization"[3] and South Africa was obliged to "promote to the utmost the material and moral well-being and the social progress of the inhabitants."[4]

The International Court of Justice, in a 1950 advisory opinion, held that the mandate had survived the dissolution of the League and that South Africa was obliged to account to the General Assembly as to its performance of a continuing international obligation.[5]

In 1962, Ethiopia and Liberia commenced an action in the International Court against South Africa alleging that the practice of *apartheid* in South-West Africa by the respondent mandatory was a violation of the terms of the mandate. Jurisdiction was based on the claim that a "dispute" existed between the parties within the meaning of Article 7 of para. 2 of the mandate, by which the Mandatory agreed that

> . . . if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the

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1. BRIERLY, THE LAW OF NATIONS 285 (5th ed.).

2. [1966] I.C.J. 7. The votes being equally divided, the President, Sir Percy Spender, cast the decisive vote.

3. LEAGUE OF NATIONS COVENANT art. 22, para. 1.

4. MANDATE FOR SOUTH-WEST AFRICA, art. 2.

5. Advisory Opinion on the International Status of South-West Africa, [1950] I.C.J. 128.

> interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice. . . .[6]

In its decision of 21 December 1962, the Court held that there existed a "dispute" within the meaning of Article 7 and that consequently it possessed jurisdiction to hear the complaint.[7]

On July 18, 1966 the Court announced its judgment. After years of expensive litigation, and in spite of its two prior opinions upon the subject matter, the Court dismissed the applicants' claim on the grounds that they had failed to demonstrate the existence or possession of a legal right in the subject matter of the controversy to which a duty of accounting by South Africa could correspond.

The inability of the applicants to prove the necessary right was coupled with a failure to establish to the satisfaction of the majority the existence of an objective legal norm prohibiting racial discrimination. The dispute was, therefore, nonjusticiable, *i.e.*, incapable of settlement according to legal principles.

The sharp contrast between the legalism of the decision and the moral repugnancy of *apartheid*, which the application sought to condemn, provokes reflection upon the contemporary significance of the justiciable concept and its relation to the peaceful settlement of international controversies. In the remainder of the article I shall examine the question of international justiciability both in itself and in relation to the South-West Africa controversy. I shall also suggest reasons why a deeper understanding of justiciability is necessary if the International Court of Justice is to make a meaningful contribution to the progressive development of international law.

II. THE POLITICAL QUESTION

In addition to susceptibility of settlement by objective legal criteria, there are other qualifications which an international dispute should possess before it is generally considered to be justiciable. The foremost of these is that the dispute must not be "political." If a dispute, otherwise susceptible of legal analysis, touches vital interests—the commercial position, honor, or prestige of the contesting states, it is often considered to be nonjusticiable.[8] In spite of some fundamental weaknesses in this theory,[9] many jurists subscribe to it, and undoubtedly it has contributed

6. See [1962] I.C.J. 335.

7. South-West Africa Cases: Preliminary Objections [1962] I.C.J. 319.

8. See LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, Ch. VII (1966).

9. Legal disputes are never completely divorced from politics, and in the history of

to the restricted role that international tribunals have performed in settling interstate controversies. This is especially true when the deeper significance of the political dimension is understood.

When an international dispute grows out of deep political tensions, the controversy is in fact nonjusticiable, even where it is superficially resolvable in terms of legal rights and obligations. By announcing a decision in juristic terms a court fails to conclusively settle the dispute; it speaks of legal rights, while the parties are more concerned with inarticulated interests and distributions of power. In such circumstances the judiciary is incapable of fulfilling its essential function of finally deciding the difference between the parties.[10] This conception of justiciability probably influenced the majority of the International Court in the South-West Africa judgment. *Apartheid* in the mandated territory is a part of an overall conflict between South Africa and the negro nations of the continent as to the final destiny of the two civilizations. Moreover, the nature of the applicants demand: an abstract determination of the compatibility of *apartheid* with the obligation of the mandate, was incapable of encompassing the wider difficulties which keep the litigants from peaceful coexistence.

Taken cumulatively, the several aspects of the present doctrine of justiciability tend to lead inexorably to the actual judgment of the Court. The absence of available criteria demonstrating a right and objective standard of measurement; the underlying political tensions; the potential incompleteness or unconclusiveness of an affirmative judgment; all strongly suggest that the dispute was essentially nonjusticiable. But was the Court conscious of all relevant considerations? Would a deeper understanding of the nature of the international community, joined with a wider grasp of its institutional function in that community, have led the Court to a different result? In other words, was the majority fully attuned to all the nuances of the crucial concept: justiciability?

III. TOWARDS A RENEWAL OF JUSTICIABILITY

In addition to the factors already enumerated, an understanding of justiciability is also influenced by one's conception of the nature of international society and the role the judiciary should perform in the realization of its purposes. The "political" controversy theory of nonjusticiability is strongly influenced by an Austinian model of international life. An international community coextensive with the juxtaposition of absolute

international arbitration and adjudication there are instances of the peaceful settlement of disputes which had important political implications: *e.g.* the *North Atlantic Fisheries* arbitration and the *Austro-German Customs Union* decision. Moreover, many controversies which are suitable for judicial treatment are often arbitrarily characterized as political by states. See LAUTERPACHT, *op. cit., supra*, at 145-172.

10. DEVISSHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 331 (1957).

sovereign states[11] allows a subjective determination of vital interests to be sufficient cause for withdrawal from the peaceful settlement of an international controversy which is otherwise justiciable. Similarly, the continual process of conferring upon interests a juridical status, the elevation of sociological reality to the judicial forum, is largely determined by a given court's awareness of the deeper social values which impinge upon, and measure the conduct of the litigants. Understanding a societal commitment to human rights allows the Supreme Court of the United States to express them in legal form; the International Court, lacking a comparable insight, was unable to raise the applicants' interests in the South-West Africa litigation to the legal plane.

A deeper awareness of international society, a grasp of the immense human enterprise to which it is committed, affects the role of the Court as well as the development of legal standards. When international society is viewed as being radically individualistic, the role of the Court correspondingly contracts. If the body of legal rules is coextensive with express commitment of national will, the reservoir of judicial strength is equally restricted. The result is an anemic judiciary incapable of responding meaningfully when circumstances demand creative law making. Such an indictment surely applies to the South-West Africa decision, where, according to the opinion of a concurring justice, South Africa could not be considered as having consented to the promotion of the moral well being of the inhabitants in a manner other than she, in her unfettered discretion, felt to be appropriate.[12]

Another factor of importance is the Court's institutional position. So much depends upon the Court's understanding of the role it should play in the development of a meaningful world order. A more organic understanding of the Court's role should influence the quantity of disputes which it feels it is capable of resolving.

The International Court of Justice was intended to bear a functional relationship with the United Nations. Unlike the Permanent Court, which was loosely linked with the League, the International Court is a principal organ of the new world organization,[13] committed, like the other organs, to the realization of the underlying charter purposes: the promotion of human rights, together with "social progress and better standards of life in larger freedom."[14] It is thus caught up in the whole dynamism of human dignity and freedom which pulsates through the entire organization. The exercise of its function cannot escape the influence of these noble objectives.

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11. I. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 121 (Campbell ed. 1875).
12. Van Wyk, J., *concurring*, [1966] I.C.J. at 87, 122-126.
13. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE, 37 (1961).
14. U.N. CHARTER Preamble.

None of these considerations lie purely upon the plane of legal philosophy, capable of only remote influence upon the actualities of international litigation. They all possess a more proximate juridic expression which an alert judiciary can draw upon without usurping its institutional function. It is possible to translate an expanded understanding of the justiciability of disputes into its corresponding positive law determinations. If the more significant aspects of justiciability had more influence, it is possible that a different result would have been obtained in the South-West Africa litigation.

IV. JUSTICIABILITY IN THE SOUTH-WEST AFRICA CONTROVERSY

The applicants could not establish the direct conference of a legal right upon them, to which a corresponding duty of South Africa would attach. The Court also refused to recognize the applicants as being the beneficiaries of a general interest in the proper administration of the mandate.[15]

The notion of general interest is closely tied to what is understood in American jurisprudence as standing to sue—a judicial conception ultimately explicable only in terms of a common commitment to a specific social goal.[16] On the international sphere, it depends finally upon an understanding of society which is organic rather than individual; *i.e.*, a conception which sees the nation states as being engaged in purposeful human enterprise which transcends the particular interests and involves the states in something essentially spiritual—a common commitment to freedom, human dignity and the intrinsic worth of all mankind.

There are municipal analogies for the idea of standing, such as the administrative and constitutional aspects of the doctrine in the United States.[17] But there were ample international precedents upon which the Court could have drawn and applied to the controversy. The jurisdictional clauses in the minorities treaties after World War I recognized a common interest in the observance of the humane purposes the treaties were designed to achieve;[18] and the conception of such an interest had gained some acceptance by the Permanent Court,[19] as well as among competent legal scholars.[20] More importantly, the very nature of the mandate is such that it is not susceptible of particular state interests. As Justice Forster so aptly expressed in his dissent:

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15. [1966] I.C.J. 32-42 (Judgment).

16. For a discussion of standing see 1966 I.C.J. 385 (Jessup, J., dissenting).

17. See *e.g.* Jafee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

18. See the discussion in the dissenting opinion of Justice Wellington Koo [1966] I.C.J. at 246.

19. See The Wimbledon, 1923 P.C.I.J. ser. A, No. 1.

20. See JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 524 (1964).

> It was in the interest of the Native inhabitants that the mandate for German South West Africa was instituted, and its essential provisions have no other purpose than "to promote to the utmost the material and moral well being and the social progress of the inhabitants of the territory." The Mandate was not concluded in the interests of the State Members of the League of Nations or in that of the League itself. It was concluded in the interest of Native peoples not yet capable of governing themselves. It was a "sacred trust" conferred and accepted without any corresponding advantage for either the Mandator or the Mandatory. The circumstances were those of complete altruism. However, the beneficiaries of the generous provisions of the Mandate, namely the Natives of South West Africa, have no capacity to seize the International Court of Justice as they do not as yet constitute a sovereign state. Nor do they enjoy the nationality of a state capable of seizing the Court for the protection of its nationals. This being so, what is the compelling rule which prevents the Court . . . taking into account . . . the principle of the general interest in a correct application of the mandate regime?[21]

Finally, the impulse towards recognition of a common interest was part of the inner logic of the earlier decisions of the Court on the subject of South-West Africa. In its earlier decision on the international status of South-West Africa the Court, rejecting an argument by the Union of South Africa that the mandate had lapsed because of the termination of the League, stated that:

> The essential international character of the functions which had been entrusted to the Union of South Africa appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports to it; it also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.[22]

More importantly, the same position was repeated in the decision upon preliminary objections in the instant litigation. The Union's third objection to the Application was that the controversy was not a "dispute" within the meaning of Article 7 of the Mandate, especially since no

21. [1966] I.C.J. at 479.
22. [1950] I.C.J. at 133.

material interest of the applicants was affected. The Court dismissed the objection, and stated:

> . . . Article 7 in effect provides, with the express agreement of the mandatory, for judicial protection by the Permanent Court by investing the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose in each of the other Members of the League. Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important.
>
> The foregoing considerations and reasons lead to the conclusion that the present dispute is a dispute as envisaged in Article 7 of the Mandate and that the Third Preliminary Objection must be dismissed.[23]

Although both decisions were by narrow majorities, they do reflect the judgments of the Court. Although it is disputable whether the Court was bound to follow its preliminary objection judgment in the same litigation,[24] the reasons for not following the earlier pronouncements are objectionable because of the philosophy of justiciability they reflect. This radical insistence upon proof of the specific grant of a legal right reflects an attitude unaccustomed to the organic dimensions of international life. It is rather an expression of extreme positivism, passively awaiting the creation of legal rules by individualistic, absolutely sovereign, states. It thus correspondingly circumscribes within artificial limits the circumstances under which a state's proper interest in the observance of the humanitarian objectives of the mandate can be translated into a justiciable legal right.

Beyond the question of an adequate legal interest in the subject matter of the claim is the second aspect of justiciability: the presence of an objective legal standard adequate to measure the conduct of the respondent state, South Africa. For the majority, there was no norm of adequate positive quality to bring into being the necessary judicial standards. For example, Justice Van Wyk, in his concurring opinion, stressed that the Court's activity is circumscribed by the limitations of Article 38 of the Statute of the Court, and that the moral exhortations against the practice of racial discrimination, both within the United Nations and without, had not crystallized into positive legal standards. Accordingly,

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23. [1962] I.C.J. at 344.

24. Compare the reasoning expressed in the judgment: that the 1962 decision referred only to jurisdiction, making it incumbent upon the applicants to prove the possession of a right at the hearing on the merits—[1966] I.C.J. at 37-38; with the dissenting opinion of Mr. Justice Koretsky that the 1962 Judgment included a determination of right and was binding upon the Court [1966] I.C.J. at 237-239.

the "whole concept of 'human rights and fundamental freedoms' is as yet an undefined and uncertain one with no clear content."[25]

Yet much depends upon one's awareness of the prominence of human rights in the political and legal structures of modern states. Arguably, the development of human rights is an integral part of the modern law of nations (South Africa notwithstanding). If so, it is therefore within the scope of the Court's jurisdiction as part of the general legal principles of civilized nations.[26] Moreover, a deeper understanding of the Court's function as a principal organ of the United Nations should connect the human rights objectives expressed in the Charter more intimately with the exercise of the judicial office.

There was another manner by which the necessary legal standard could have been articulated and applied, a way attuned to concrete judicial responsibility and thus especially positive in its thrust. As Judge Jessup noted in his dissent, the issue before the Court was a dispute concerning the interpretation of the terms of the mandate, rather than a general question concerning the compatibility of *apartheid* with international law. Viewing the question in these terms directs attention to the judicial function in the interpretative process together with the search for criteria which the fulfillment of the responsibility implies. As Judge Jessup cogently put the matter:

> The importance of the issues lies in the fact that at times the argument of Applicants seemed to suggest that the so-called norm of non-discrimination had become a rule of international law through reiterated statements in resolutions of the General Assembly, of the International Labour Organisation, and of other international bodies. Such a contention would be open to a double attack: first, that since these international bodies lack a true legislative character, their resolutions alone cannot create law; and second, that if Applicants' case rested upon the thesis that apartheid should be declared illegal because it conflicted with a general rule of international law, it might be questioned whether such a claim would fairly fall within the ambit of paragraph 2 of Article 7 which refers to disputes about the interpretation or application of the provisions of the Mandate. If the Court were to hold that the practice of apartheid is a violation of a general rule (norm) of international law, it might seem to be passing on the legality of acts performed within the Republic of South Africa itself, a matter, which, as already noted, would be outside the Court's jurisdiction. On the other hand, if the Court had considered the question of the existence

25. [1966] I.C.J. at 165.

26. This is the position of Mr. Justice Tanaka [1966] I.C.J. 294-301 (dissenting opinion).

> of an international standard or criterion as an aid to interpretation of the Mandate, it would have been pursuing a course to which no objection could be raised. In my opinion, such a standard exists and could have been and should have been utilized by the Court in performing what would then be seen as the purely judicial function of measuring by an objective standard whether the practice of apartheid in the mandated territory of South West Africa was a violation of the Mandatory's obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory."[27]

Such an orientation, embedded within the fabric of the judicial process, would have permitted the Court to consider the deeper and wider values at stake in the litigation without exceeding the boundaries of its institutional competence. Through such an approach the court could, while adhering to a judicial tradition, search for meaning and guidance sociologically, *i.e.*, utilization of general moral ideals prevalent in the modern world to determine both the contemporary content of the Mandatory language as well as the measure of respondent's duties in the performance of that mandate.

A further point is the question of finality. As noted earlier, one aspect of the political dispute is that where the real difficulties between the parties lie in grave tensions of which the dispute is but a reflection, the judgment is incomplete and the dispute is really nonjustifiable. Put concretely, if the Court had held that *apartheid* was not compatible with the mandate it is arguable that the judgment would not bring peace to the African continent. The full differences between the parties form a larger whole of which the South-West Africa case is but a part. Moreover, it is difficult to see how a standard of non-discrimination could be meaningfully applied to all the contingencies within South-West Africa itself.[28] Yet this lack of finality should not automatically condemn the controversy to the limbo of the political. The function of the International Court is not that narrowly juridical. As an organ of the United Nations it is a part of a total process of authoritative decision-making which is mutually interdependent. It is the cumulative effect of all these influences which will determine the issue of international order. An authoritative judgment in this highly explosive situation could have immeasurably assisted the overall political process of seeking a peaceful solution to the controversy.[29]

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27. [1966] I.C.J. at 432-33.

28. See the concurring opinion of Mr. Justice Van Wyk [1966] I.C.J. at 190-193.

29. For the General Assembly reaction to the decision see G.A. RES. 2145 (xxi) reprinted in 61 A.J. INT. L. 649 (1967).

CONCLUSION

The future of international litigation is intimately bound to the justiciability of interstate disputes. The growth of the International Court's role as the principal judicial organ of the United Nations will rise or fall with the expansion or contraction of this key concept. The extension of the number of justiciable disputes, and consequent improvement of peaceful settlement depends heavily upon the attitude of the States themselves. Most disputes are susceptible of judicial treatment if the states concerned are willing to remove them from the realm of the "political controversy." But the responsibility for the growth of the justiciable is not solely that of the states. There is much that the International Court must itself accomplish. For in the last analysis it alone has the power to transform "interests" into legal rights. Only the Court, in filling its high office, can evolve the necessary standards to objectively adjudicate interstate conflicts. In this light, the *South-West Africa* Judgment is regressive for it fails to provide the necessary judicial initiative. Whether the future forebodes good or ill for justiciability and the maturity of international adjudication is difficult to predict. Yet one thing is certain: a deeper awareness in the Court of the purposes of international society, coupled with a capacity to give these ideals a judicial expression, is indispensable to human progress.